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# Public Law: Local Government Law

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# LOCAL GOVERNMENT LAW

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The stream of reported decisions involving local governments as litigants continues to flow unabated. In addition to state decisions in a wide variety of contexts, including the status of local governments vis-a-vis the state,[1] election controversies,[2] land use planning,[3] public

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1. West v. Allen, 382 So. 2d 924 (La. 1980); ACORN v. City of New Orleans, 377 So.2d 1206 (La. 1979); Rollins Envirn. Serv. v. Iberville Parish, 371 So. 2d 1127 (La. 1979). See notes 18-41, *infra*, and accompanying text. *See also* City of Baton Rouge v. Hebert, 378 So. 2d 144 (La. App. 1st Cir. 1979), *cert. denied*, 380 So. 2d 1210 (La. 1980) (state's preemption in field of oil production and storage did not preclude a city from enforcing its normal land use regulations to the construction of oil storage tanks).

2. *See, e.g.*, Roussel v. Keller, 379 So. 2d 81 (La. App. 4th Cir. 1980) (court rejects election challenge on the ground that minor mistakes in recording name by poll workers were insufficient to invalidate an election); McCarter v. Broom, 377 So. 2d 383 (La. App. 1st Cir. 1979) (candidate's effort to establish domicile within a reasonable time after court-ordered redistricting was sufficient even if the change in domicile was not actually accomplished until after the qualification date). *See also* Dupre v. Lafourche Parish Police Jury, 376 So. 2d 986 (La. App. 1st Cir. 1979) (police jury must provide plaintiff with form of petition to call a referedum seeking repeal of solid waste ordinance passed by the parish); Lehmann v. Musgrave, 374 So. 2d 1284 (La. App. 4th Cir.), *cert. denied*, 375 So. 2d 645 (La. 1979) (by becoming a candidate for public office, member of fire and police civil service board vacated his position); Toldson v. Fair, 374 So. 2d 759 (La. App. 2d Cir.), *cert. denied*, 375 So. 2d 1182 (La. 1979) (domicile provisions for candidates in newly reapportioned districts apply to reapportionments that are judically ordered).

3. *See, e.g.*, Schwegmann Bros. Giant Super Markets v. Donelon, 383 So. 2d 433 (La. App. 4th Cir.), *cert. denied*, 385 So. 2d 274 (La. 1980) (amendments to parish's comprehensive zoning code are unenforceable because the parish failed to comply with the code's requirements for notice and public hearing); Coogan v. Parish of Jefferson, 381 So. 2d 1320 (La. App. 4th Cir. 1980) (court orders parish to rezone plaintiff's property on grounds that, notwithstanding the residential zoning of the area, area was commercial because of the existence of numerous nonconforming commercial uses); City of Baton Rouge v. Causey, 380 So. 2d 136 (La. App. 1st Cir. 1979), *cert. denied*, 383 So. 2d 24 (La. 1980) (city does not need to show irreparable harm to secure an injunction requiring compliance with its zoning ordinance); City of Baton Rouge v. Hebert, 378 So. 2d 144 (La. App. 1st Cir. 1979), *cert. denied*, 380 So. 2d 1210 (La. 1980) (court enjoins building of four large storage tanks on a tract as an enlargement of a preexisting use as an oil well); West v. City of Lake Charles, 375 So. 2d 206 (La. App. 3d Cir.), *cert. denied*, 378 So. 2d 435 (La. 1979) (city's zoning ordinance constitutes the comprehensive plan required by the state enabling act); City of Kenner v. Kenner Academy, 373 So. 2d 197 (La. App. 4th Cir. 1979) (provision in city ordinance that allows temporary buildings only in conjunction with construction work does not apply to temporary buildings used as classrooms at a private academy).

contacts,[4] tort liability,[5] the public's right to observe the deliberations of meetings of public bodies,[6] the extent of the police power,[7] and public employment,[8] the United States Supreme Court rendered

4. *See, e.g.*, Slagle-Johnson Lumber Co., Inc. v. Landis Const. Co., Inc., 379 So. 2d 479 (La. 1980) (statutory lien provision applies to material consumed in construction but not made part of the permanent structure); Baton Rouge Roofing & Sheetmetal Cont., Inc. v. East Baton Rouge Parish School Bd., 380 So. 2d 151 (La. App. 1st Cir. 1979) (since reroofing of a building was "maintenance" and not "new construction" or a "major project," school board could perform the reroofing with its own personnel and without public bid).

5. Foster v. Hampton, 381 So. 2d 789 (La. 1980); LeBoyd v. Jenkins, 381 So. 2d 1290 (La. App. 4th Cir. 1980); LeBlanc v. Tyler, 381 So. 2d 908 (La. App. 3d Cir. 1980); Hryhorchuk v. Smith, 379 So. 2d 281 (La. App. 3d Cir. 1979), *cert. granted*, 381 So. 2d 1231 (La. 1980); McKinney v. Greene, 379 So. 2d 69 (La. App. 3d Cir. 1979), *cert. denied*, 381 So. 2d 1233, 1235 (La. 1980); White v. Richardson, 378 So. 2d 162 (La. App. 1st Cir. 1979); Nolen v. State, 377 So. 2d 586 (La. App. 3d Cir. 1979); Thompson v. Iberville Parish School Bd., 372 So. 2d 642 (La. App. 1st Cir.), *cert. denied*, 374 So. 2d 650 (La. 1979). See notes 233-35, *infra*, and accompanying text. *See also* Cheatham v. City of New Orleans, 378 So. 2d 369 (La. 1979) (city is liable for the death of the plaintiff at the hands of an off-duty police officer); Applewhite v. City of Baton Rouge, 380 So. 2d 119 (La. App. 1st Cir. 1979) (city is liable for the willful misconduct of its police officer who forced the plaintiff to engage in various sexual acts); Stewart v. Schmeider, 376 So. 2d 1046 (La. App. 1st Cir. 1979) (city-parish's failure to follow the rules of its building code renders it liable to workmen injured at the construction site); Broussard v. Parish of Jefferson, 375 So. 2d 722 (La. App. 4th Cir.), *cert. denied*, 377 So. 2d 119 (La. 1979) (parish had constructive knowledge of a large drain that was uncovered for four months); Norrell v. City of Monroe, 375 So. 2d 159 (La. App. 2d Cir. 1979) (city liable for false imprisonment committed by one of its police officers).

6. Eastwold v. City of New Orleans, 374 So. 2d 172 (La. App. 4th Cir.), *cert. denied*, 377 So. 2d 119 (La. 1979) (holding council meeting during normal business hours does not violate constitutional rights of city's employees to observe deliberations of public bodies).

7. Housemaster Corp. v. City of Kenner, 374 So. 2d 1240 (La. 1979) (a city may exercise its police power to destroy, without compensation, a building that is a menace to the public health and safety, but the requirements of due process mandate that the city give the owner notice and a hearing before destroying the building). *Cf.* State v. Scallon, 374 So. 2d 1232 (La. 1979) (Sunday closing law is upheld as a valid exercise of the state's police power against challenges based on the state and federal constitutions); Inn of Hammond, Inc. v. State Dept. of Transportation & Development, 376 So. 2d 1318 (La. App. 1st Cir. 1979) (court upholds state regulation of billboards along federally-financed highways against an equal protection challenge).

8. City of New Orleans v. Police Ass'n of La., 371 So. 2d 638 (La. App. 4th Cir.), *cert. denied*, 374 So. 2d 658 (La. 1979). See notes 122-40, *infra*, and accompanying text. Other significant decisions involving local officers and employees include the following: Collins v. Orleans Parish School Bd., 384 So. 2d 336 (La. 1980) (school board's denial of sabbatical leave is set aside as arbitrary and capricious); Lamm v. Board of Comm'rs, 378 So. 2d 919 (La. 1979) (hospital board's dismissal of the hospital director is valid despite the failure to comply with the board's bylaws); Kibodeaux v. Jefferson Parish School Bd., 381 So. 2d 1268 (La. App. 4th Cir. 1980) (school board can suspend a tenured teacher for refusing to confer with her supervisors except in the presence of the parents of her students); City of Kenner v. Lawrence, 376 So. 2d 564 (La. App. 4th Cir. 1979) (sole issue on appeal of a probationary employee is to decide whether the

significant decisions with respect to the ability of public officials to discharge employees that are not protected by civil service[9] and to the tort liability of local governments.[10] This year's survey examines the United States Supreme Court decisions and selected state decisions in the areas of state-local relations, public employment, and the tort liability of local governments.

## STATE-LOCAL RELATIONS

In trying to define the status of Louisiana's local governments[11] under the 1974 constitution, one should distinguish two related, but distinct, issues: (1) whether the local government has authority to act in a given area; and (2) whether state law prohibits a particular action. With respect to the authority issue, Louisiana law traditionally regarded all local governments as creatures of the state authorized to exercise only those powers specifically granted by the state constitution or state law,[12] but the 1974 constitution significantly alters this general rule. In sweeping terms, it allows a local government with a home rule charter to exercise any powers or to perform any functions "necessary, requisite, or proper for the management of its affairs,"[13] so long as its charter permits. By contrast, governments without home rule charters (denominated "other local governments" by the constitution) normally exercise only those powers that are authorized by the constitution or by state law. However, such a non-home rule local government can expand its author-

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employing authority has given the applicant a fair opportunity to prove his ability in the position); Tucker v. Huval, 374 So. 2d 745 (La. App. 3d Cir. 1979) (willful evasion of federal income taxes is not a conviction justifying removal from public office under state statute); Civil Service Comm'n v. Rochon, 374 So. 2d 164 (La. App. 4th Cir. 1979) (chief administrative officer of New Orleans cannot alter the methods of compensation set by the city's civil service commission).

9. Branti v. Finkel, 100 S. Ct. 1287 (1980). See notes 94-121, *infra*, and accompanying text.

10. Owen v. City of Independence, 100 S. Ct. 1398 (1980). See notes 150-91, *infra*, and accompaying text.

11. The 1974 constitution defines the term "local governmental subdivision" to include both parishes and municipalities. LA. CONST. art. VI, §§ 1 & 2. The current article uses the term "local government" synonymously with the constitution's "local governmental subdivision" term.

12. *See, e.g.*, City of Shreveport v. Brister, 194 La. 615, 194 So. 566 (1940). *See generally* Kean, *Local Government and Home Rule*, 21 LOY. L. REV. 63, 64-65 (1975).

13. LA. CONST. art. VI, § 5(E) (new home rule governments). A similar rule applies to existing home rule governments by virtue of the provision allowing them, if their charters permit, to exercise all powers that section 7 grants to "other local governments." LA. CONST. art. VI, § 5(F). For a more detailed summary of the constitutional provisions, *see The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Local Government Law*, 39 LA. L. REV. 843, 851-52 (1979) [hereinafter cited as *Local Government Law—1977-78 Term*].

ity to match that of home rule governments (that is, to encompass any power or function "necessary, requisite, or proper for the management of its affairs") if the local electorate approves in an election held for that purpose.[14]

Of course, state law may prohibit a specific action even though it falls within an area in which a local government has authority to act. Thus, no local government can exercise any power or function "inconsistent with" the constitution.[15] Moreover, with respect to non-home rule governments and home rule governments formed after the effective date of the 1974 constitution, specific constitutional provisions forbid the exercise of any power or the performance of any function "denied by general law."[16]

In the past, Louisiana decisions often merged the authority and prohibition questions.[17] Under the state creature concept, this merger was understandable because one could infer the lack of specific authorization from the existence of arguably prohibitory state statutes. But now that local governments may derive their authority to act directly from the constitution, sound analysis requires a more complete seperation of the two issues. Unfortunately, the decision of *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*[18] indicates that the supreme court continues to adhere to old approaches notwithstanding the changes in the 1974 constitution. In *Rollins*, the court invalidated an Iberville Parish ordinance that banned the disposal of all hazardous waste within the parish. The court seemed to offer two alternate grounds for its decisions: (1) state law did not authorize the Iberville Parish

14. LA. CONST. art. VI, § 7(A).

15. *Id.* §§ 4, 5(E), 7(A).

16. *Id.* §§ 5(E), 7(A). The constitution's section on local governments with home rule charters in existence on the date the constitution was adopted does not contain the "not denied by" language. It continues the "powers, functions, and duties in effect" when the constitution was adopted "[e]xcept as inconsistent with this constitution." *Id.* § 4. However, most—probably all—of the pre-1974 home rule charters contain provisions that forbid the local governments from exercising any power "inconsistent with" a general state law. *See, e.g.*, LA. CONST. art. XIV, §§ 3(a)(2) (1921, amended 1946) (consolidated government for City of Baton Rouge and East Baton Rouge Parish); *id.* § 3(c)(3) (1921, amended 1956) (home rule government for Jefferson Parish); *id.* § 40(c) (1921, amended 1952) (general authorization for municipalities to adopt home rule charters).

17. *See, e.g.*, City of Minden v. David Bros. Drug, Co., 195 La. 791, 197 So. 505 (1940).

18. 371 So. 2d 1127 (La. 1979). Justice Tate's concurring opinion points out that the language of the majority opinion with respect to the authority issue should be limited to those local governments without home rule charters whose electorates have not granted them broader powers. 371 So. 2d at 1134-35.

Police Jury to regulate hazardous waste,[19] and (2) the ordinance infringed on the spirit of state laws governing hazardous waste disposal and was thus inconsistent with general state law.[20]

Since Iberville Parish did not have a home rule charter, the authority issue turned on whether state law authorized the parish's police jury to regulate hazardous waste. The Parish relied on two subsections of R.S. 33:1236; these two provisions grant police juries the power to enact ordinances "[t]o protect their respective parishes against the introduction of every kind of contagious disease"[21] and the power "[t]o enact ordinances to require the destruction, disposal, or burning of . . . debris of any kind . . . ."[22] The court held, however, that neither provision was adequate to justify police jury regulations of hazardous waste. Although conceding that the wording of the subsections might "arguably be extended by construction to include prohibiting any disposal of hazardous waste within a parish," it concluded that "such a construction . . . is not warranted in the context of those subsections."[23] The court relied on two basic arguments for its conclusion: the lack of any specific mention of hazardous waste in either provision[24] and the lack of similarity between hazardous waste and items specifically covered in the subsections on which the police jury relied.[25]

As Mr. Justice Tate's concurring opinion suggests,[26] the potential impact of the ruling on the authority issue is relatively limited. It would not apply to local governments with a home rule charter,[27] and if the local electorate were willing to approve a broader grant of power, other local governments could avoid the restriction the ruling imposes.[28] Nonetheless, the court's holding on this issue seems unduly restrictive in light of expanded authority that the 1974 constitution grants to local governments. Although a strict construction of local government power might have been justifiable when the state creature concept accurately reflected the allocation of power between the state and its local governments, such an approach serves no useful function under a system that is willing to grant local governments broad authority to act so long as the state has

19. 371 So. 2d at 1130-31.
20. *Id.* at 1131-34.
21. LA. R.S. 33:1236(16) (1950).
22. *Id.* 33:1236(31) (Supp. 1966 & 1977) (emphasis added).
23. 371 So. 2d at 1130.
24. *Id.*
25. *Id.* at 1130-31.
26. 371 So. 2d at 1134.
27. LA. CONST. art. VI, §§ 4, 5(E); see note 13, *supra*, and accompanying text.
28. *Id.* § 7(A); see note 14, *supra*, and accompanying text.

not prohibited a specific action that is challenged. Far more desirable would be a sympathetic reading of specific grants of power to enable the local government to exercise all powers it needs to protect the health, safety, and welfare of its citizens.[29]

More significant is the court's alternate basis of its opinion—that the ordinance was inconsistent with general state law because it infringed on the spirit of state and federal laws governing hazardous waste disposal—since this holding apparently would apply to all local governments.[30] In reaching this determination, the court specifically relied on the Federal Resources Conservation and Recovery Act,[31] which (according to the court) "regulates the entire field of 'solid waste' disposal from simple sanitary landfill to industrial waste disposal,"[32] as well as state laws granting the Commissioner of Conservation authority to protect fresh water supplies and to regulate subsurface injections of waste;[33] the Department of Health and Human Resources' "jurisdiction over the handling, storage and disposal of waste;"[34] and the Department of Natural Resources' "exclusive jurisdiction for the development, implementation, and enforcement of a comprehensive state hazardous waste

29. The argument in the text differs slightly from the claim of the Iberville Parish police jury that it retained "general powers to protect the health and well-being of its citizens." 371 So. 2d at 1131. The argument in the text does not posit the existence of such a residuary power; it merely advocates liberal interpretation of the powers conferred by statute so that parish governing authorities are able to respond to problems without the necessity of the frequent amendment of R.S. 33:1236 that has been necessary in the past.

30. Technically, the preemption holding in *Rollings* found the exercise of the power by the parish "inconsistent with" general law, 371 So. 2d at 1131, and it did not discuss whether the state law was sufficiently explicit to satisfy the "denied by general law" language of the 1974 constitution. But in the only preemption case directly involving the "not denied by" language of the 1974 constitution, the court ignored the evidence that the Constitutional Convention intended to distinguish the phrases "consistent with" and "denied by" and treated them as synonomous. City of Shreveport v. Curry, 357 So. 2d 1078 (La. 1978) (dictum), *criticized in Local Government Law—1977-78 Term*, *supra* note 13, at 857-60.

31. 42 U.S.C.A. §§ 6901-87 (1978).

32. 371 So. 2d at 1132. The court noted that the use of the term "solid waste" in the statute was a misnomer because the statute defined the term to include "solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining, and agricultural operations . . . ." *Id.*, *quoting* 42 U.S.C. § 6903(27) (1976). In fact, at the time *Rollins* was decided, the federal program was not so pervasive as Chief Justice Summers suggested. *See* Murchison, *Recent Environmental Developments Affecting Oil and Gas Operations*, 26 MIN. L. INST. 54 (1979).

33. 371 So. 2d at 1133, *citing* 1976 La. Acts, No. 122; 1940 La. Acts, No. 157.

34. 371 So. 2d at 1131.

35. 371 So. 2d at 1133, *citing* 1978 La. Acts, No. 334, *adding* LA. R.S. 30:1101-16. For descriptions of the 1978 statute, *see* Murchison, *supra* note 32, at 76; *The Work of the Louisiana Legislature for the 1978 Regular Session—Environmental Law*, 39 LA. L. REV. 250-53 (1978).

control program consistent with federal laws and regulations."[35] This legislation was sufficient, the court declared, to demonstrate "an affirmative and positive preemption by the state and federal governments in the field of hazardous waste regulation."[36]

One would find it difficult to quarrel with the preemption holdings in *Rollins* if the state and federal laws on which the court relied supported its conclusion. But the essential weakness of this portion of the opinion is the failure to examine the content of the federal and state laws on which the court relies. In fact, although both the state and the federal government were devising programs for regulating hazardous waste when *Rollins* was decided,[37] neither had yet implemented a comprehensive program of hazardous waste control at that time. While both the court's concern with the dangers of parochial local regulation[38] and its invalidation of the specific ordinance before it were justifiable,[39] the refusal to countenance any local regulation was ill-advised because it forced all local governments to wait for state and federal action before attempting reasonable regulation of a singularly significant threat to the health and safety of the local population. In essence, *Rollins* seems to rest on an assumption that the existence of state and federal laws in an area necessarily manifests an intent to oust local governments from all regulatory authority in that area, a kind of preemption by numbers. That assumption is a particularly dubious one in the environmental field, where state and federal regulations often reflect a willingness to allow local governments the authority to go beyond the minimum standards established in state and federal legislation.[40]

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36. 371 So. 2d at 1134.

37. *See* Murchison, *supra* note 32, at 79.

38. In his majority opinion, Chief Justice Sanders stated:

> It is not difficult to conclude that if Iberville Parish is permitted to prohibit the disposal of industrial hazardous waste within its borders there will be, in short order, similar ordinances in every parish of the State. Indeed, several parishes have enacted such ordinances. Louisiana's prominent position in industry makes it one of the Nation's foremost producers of chemical and other industrial waste classified as hazardous. As such it cries out against the prospect of such a stifling prohibition.

371 So. 2d at 1132.

39. *See* Murchison, *supra* note 32, at 79.

40. *See, e.g.*, 42 U.S.C.A. § 7416 (1977) (Clean Air Act); 33 U.S.C. § 1370 (1976) (Clean Water Act); 42 U.S.C. § 4905(e)(2) (1976) (Noise Control Act). *Cf.* 42 U.S.C. § 6929 (1970) (if appliction of federal hazardous waste regulations is enjoined, as to any matter, "no State *or political subdivision* shall be prohibited from acting with respect to the same aspect of such matter until such regulation takes effect") (emphasis added). Most recent federal statutes have even required the federal government itself to comply with environmental regulations imposed by state and local government. *E.g.*, 42 U.S.C.A. § 7418 (1977) (Clean Air Act); 33 U.S.C.A. § 1323 (1977) (Clean Water Act); *see*

In the final analysis, the legislature probably will resolve the precise issue involved in *Rollins* by a procedure that is already being relied on by a number of states: a limited local authority to prohibit disposal of hazardous waste subject to a state agency's authority to override that decision in specific cases.[41] Unfortunately, the analytical weakness in the supreme court's approach to that problem may impose more lasting restrictions on the ability of local governments to deal with environmental and other problems that are valid matters of local concern.

A second decision tending to restrict the authority of local governments vis-a-vis the state was *West v. Allen*.[42] In *West*, the Louisiana Supreme Court ruled that the state constitution and not the Jefferson parish home rule charter prescribed the civil service system applicable to the fire fighters employed by the parish fire department. Specifically, it held that "the classified civil service system for firemen and policemen established by . . . the [1974] Constitution . . . is applicable to the parish of Jefferson and the firemen it employs."[43]

Prior to the adoption of the 1974 constitution, Jefferson Parish operated under a home rule charter that established a civil service system applicable to all of its employees, including fire fighters and police officers.[44] The new constitution provided that the charter was to "remain in effect," and it also allowed the parish to "retain all powers, functions, and duties in effect" when the constitution was adopted "[e]xcept as inconsistent with [the] Constitution."[45] But article X of the constitution established a special civil service system for fire fighters and police officers.[46] The section establishing the system made it applicable to "all parishes . . . operating a regularly paid fire department,"[47] and a separate section in article X provided

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*generally* Murchison, *Waivers of Intergovernmental Immunity in Federal Environmental Statutes*, 62 VA. L. REV. 1177 (1976).

41. *See, e.g., Current Developments*, 11 ENV. RPTR. (BNA) 50 & 244 (Minnesota & Connecticut) (1980). This approach seems to have found favor with federal officials. 9 *id.* at 2295 (1979); *See also* 11 *id.* at 272 (1980). A 1979 Louisiana statute gives the Louisiana Department of Natural Resources "exclusive jurisdiction" to develop a comprehensive hazardous waste control program for the state, LA. R.S. 30:1134 (Supp. 1979), but also continues a provision prohibiting the state from issuing permits for uses that would violate local zoning laws. *Id.* 30:1144 (Supp. 1979).

42. 382 So. 2d 924 (La. 1980).

43. *Id.* at 926.

44. An amendment to the 1921 Constitution authorized Jefferson Parish to enact its home rule charter. LA. CONST. art. XIV, § 3c (1921, amended 1956). *See generally* Letellier v. Jefferson Parish, 254 La. 1067, 229 So. 2d 101 (1969).

45. LA. CONST. art. VI, § 4.

46. LA. CONST. art. X, § 16.

47. LA. CONST. art. X, § 16.

that "paid firemen in *all* parishes" were exluded from the general parish civil service systems.[48]

The supreme court ruled that the constitution's provision applied to the fire fighters of Jefferson Parish. Assuming the crucial issue, the court defined the creating of "a civil service system which includes . . . firemen and policemen" as a "*function* of [a] local government subdivision."[49] It then proceeded to hold the parish provisions invalid on the ground that in view of the numerous differences between the parish system and the fire and police system of article X, the provisions of the parish home rule charter that tried to encompass fire fighters within the parish civil service system were "inconsistent with the 1974 Constitution."[50]

The court made a difficult problem of interpretation easy by pretending that it did not exist. The consistency requirement of the section of the local government article dealing with existing home rule charters applied only to aspects of the charter that can be termed "powers, functions, and duties"; otherwise provisions of the home rule charter "remain in effect.[51] Moreover, in construing the same Jefferson Parish home rule charter involved in *West*, the pre-1974 decision of *Letellier v. Jefferson Parish*[52] concluded that the establishment of a pension plan for fire fighters was neither a power nor a function but was a matter of "the 'structure and organization' of the parish government and by the constitutional allocation fell under the exclusive control of Jefferson Parish."[53] By failing even to note this decision, the court thus avoided the difficulty (if not the impossibility) of explaining why creating a civil service system is a "function" but establishing a pension system is not.

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48. LA. CONST. art. X, § 15.

49. 382 So. 2d at 926.

50. *Id.* The court enumerated the following inconsistencies:

> the Jefferson system includes police and firemen in the system with all other employees, while the Constitution establishes a system of fire and police civil service which applies to towns larger than thirteen thousand and to all parishes with paid fire departments; the constitutional system covers all towns of a certain size, and all parishes, while Jefferson Parish seeks to exclude its firemen from the constitutional system; the Constitution authorizes civil service systems for political subdivisions, specifically excluding from them police and firemen (Article 10, § 19), while Jefferson includes police and firemen with all other employees in its civil service system.

51. LA. CONST. art. VI, § 4.

52. 254 La. 1067, 229 So. 2d 101 (1969). *See also* LaFluer v. City of Baton Rouge, 124 So. 2d 374 (La. App. 1st Cir. 1960). The 1974 Louisiana Constitution forbids the legislature from enacting laws that interfere with the "structure and organization" of local governments that have adopted home rule charters. LA. CONST. art. VI, § 6.

53. 254 La. at 1073, 229 So. 2d at 103.

Despite this analytical weakness in the opinion, the court appears to have reached a correct result in *West*. It could, however, have explained its decision more convincingly on either of two grounds. As one approach, the court could have overruled or, perhaps, distinguished *Letellier*, thus producing the inconsistency that the *West* opinion assumes. Alternatively, the court could have accepted *Letellier* and then resolved the conflicting constitutional language between the article VI provision that the Jefferson Parish home rule charter remains in effect and the establishment in article X of a special civil service system for parish fire fighters. If the court had faced this conflict directly, for several reasons it should have reached the same result as the most reasonable construction of the constitutional document. First, the provisions of article X are more specific, since they address the particular problem of civil service, while the provisions of article VI address the more general problem of local government authority and powers. Second, the language of article X is extremely inclusive; both the section establishing the police and fire system and the section prohibiting inclusion of fire fighters within general parish systems apply to "all" parishes.[54] Third, although the convention debates on article X contain no explicit discussion of the applicability of the police and fire civil service system to home rule parishes, they do contain considerable discussion, and a special provision, concerning whether the fire fighters and police officers of New Orleans should be covered by the special system or remain a part of the city's general civil service system;[55] this extensive discussion suggests that the convention knew how to create exceptions to its expansive language when it wanted to do so. Fourth, the admittedly sketchy convention record on the point contains at least one indication that the purpose of constitutionalizing the special system for parishes with paid fire departments was to make it applicable to parishes with home rule charters.[56]

Of course, *West* adopted neither rationale that would adequately explain its result, and the reason for ignoring *Letellier* hardly can be an oversight, since the prior decision is extensively cited in the parish's brief.[57] A more likely explanation is that the court continues to postpone developing an analytical framework for resolving a decision that it must face eventually: defining the extent to which home rule local governments are protected from state interference in

54. LA. CONST. art. X, §§ 15, 16.

55. LA. CONST. art. X, § 1. *See* 7 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 1483-96 (1973).

56. *See* 9 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS 2770-84, 2812-20, 3357 (1973).

57. Brief for Respondent at 2.

those purely internal affairs that the 1974 constitution defines as matters of "structure and organization."[58]

Considerably more sympathetic than either *Rollins* or *West* to the needs of local government for adequate authority to deal with local problems is the Louisiana Supreme Court's decision in *ACORN v. City of New Orleans*,[59] which sustained a $100 "service charge" that the city levied on each parcel of land listed or assessed on the city's tax rolls.[60] The city acknowledged that the charge imposed

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58. *See Local Government Law—1977-78 Term, supra* note 13, at 853 n.54. For a brief summary, with excerpts of the convention debates on the point, *see* K. MURCHISON, LOCAL GOVERNMENT LAW—SUPPLEMENTARY CASES & MATERIALS 84-89 (1979).

59. 377 So. 2d 1206 (La. 1979). Chief Justice Summers and Justice Blanche filed dissenting opinions, and Justice (ad hoc) Landry submitted an opinion concurring in part and dissenting in part. The opinion of the Chief Justice castigated the majority decision for casting aside "constitutional principle[s] of property taxation as fundamental as any which has guided Louisiana's destiny since 1852," the principles "that taxation shall be equal and uniform throughout the territorial limits of the authority leveling the tax, and that all property shall be taxed in proportion to its value." 377 So. 2d at 1208 (Summers, C.J., dissenting). He grounded this holding on Article XIV, § 16 of the 1974 Constitution which continues a uniformity requirement as a statute, and Article VI, § 26(A) which requires that an increase in the millage rate for municipal ad valorem taxes be approved by the municipality's electorate. The Chief Justice also argued that the New Orleans levy violated the equal protection guarantees of the state and federal constitutions; it did not tax the plaintiffs' property "at the percentage of value applicable to others equally and similarly situated." *Id.* at 1209.

Justice Blanche's brief dissent objected to the New Orleans tax because it circumvented "the concept of 'ad valorem' property taxes to support general revenues" and thereby denied the electorate of New Orleans the constitutional safeguard of requiring an election before ad valorem taxes could be increased. 377 So. 2d at 1210 (Blanche, J., dissenting). Moreover, he also concluded that the tax denied New Orleans property owners equal protection of law because of "the inequity, unfairness and grossly disproportionate differences" it created. *Id.*

Justice Landry concurred "in the majority holding that the ordinance in question does not impose an ad valorem tax and that it does not violate the provisons of La. Const. 1974, Article VI, Section 26(A) and Section 27(A) which limit the levy of ad valorem taxes." 377 So. 2d at 1210 (Landry, J., concurring in part, dissenting in part). But he dissented with respect to the equal protection issue. Although he conceded that legislatures have "broad discretion" in erecting tax classifications, he nonetheless found the New Orleans tax invalid because "the tax burden . . . imposed is so utterly disproportionate as to be completely devoid of a rational basis." *Id.* at 1210-11.

60. The city's ordinance provided in part:

> . . . except as hereinafter provided each owner of real property within the limits of the City of New Orleans shall pay, and there is hereby levied upon the owner thereof, an annual special real property service charge of One Hundred ($100.00) Dollars for each parcel of real property owned by him and separately listed and/or assessed on the tax rolls of the City of New Orleans for the year 1979 and for each year thereafter.

377 So. 2d at 1208, *quoting* New Orleans Ordinance No. 7009, *as amended by* Ordinance Nos. 7110, 7280, 7286.

was a tax;[61] therefore, the issue for the court was whether New Orleans constitutionally could impose such a tax. The initial question, the issue of the city's authority to act, presented little difficulty, since the city's charter gives it specific authority to impose "all kinds and classes of taxes or license fees that are necessary for the proper operation and maintenance of the municipality" except those that are "expressly prohibited by the Constitution of the State of Louisiana."[62] Although the court declared that neither party "had suggested that the tax [levied by the city was] . . . expressly prohibited by the Constitution,"[63] it nonetheless considered but rejected two constitutional objections raised by the plaintiffs: (1) that the tax conflicted with the property tax provisions of the 1974 constitution; and (2) that the tax violated the equal protection guarantees of the state and federal constitutions.[64]

The plaintiffs contended that the tax conflicted with the state constitution's property tax provisions in three respects—because it was not levied in proportion to the value of the property taxed, because it increased the amount of tax on assessed valuation of real property in the city and thereby circumvented the constitution's limit on the millage rate for municipal ad valorem taxes, and because it levied a tax that circumvented the homestead exemption established by the constitution. With respect to the first of these contentions, the court concluded that the tax was valid even though it was not proportionate to the value of the property taxed. The court began its analysis by tracing the development of the restrictions on property taxation that appear in the 1974 constitution. The six state constitutions enacted between 1845 and 1913 required that all property taxes be proportionate to the value of the property taxed,[65] but the 1921 Constitution omitted this requirement and substituted the more lenient requirement that all taxes "be uniform upon the same class of subjects throughout the territorial limits of the authority levying the tax."[66] The 1974 constitution also failed to

61. 377 So. 2d at 1211. Previous decisions left little doubt that, regardless of the label the city attached to the levy, it was a tax, since it was not "a direct charge for services rendered." Southern Pac. Transp. Co. v. Parish of Jefferson, 315 So. 2d 619, 621 (La. 1975).

62. 377 So. 2d at 1212, *quoting* La. Acts, No. 338, *amending* New Orleans City Charter § 1(f). On this basis, the court distinguished *Southern Pac. Transp. Co. v. Parish of Jefferson*, 315 So. 2d 619 (La. 1975), in which the parish conceded that it was not authorized to levy a tax.

63. 377 So. 2d at 1212.

64. LA. CONST. art. 1, § 3; U.S. CONST. amend. XIV, § 1.

65. LA. CONST. art. 225 (1913); LA. CONST. art. 225 (1898); LA. CONST. art. 203 (1879); LA. CONST. art. 124 (1864); LA. CONST. art. 123 (1852); LA. CONST. art. 127 (1845).

66. LA. CONST. art. 10, § 1 (1921). Actually, the change first occurred in a 1916 amendment to the 1913 constitution. *See* 1916 La. Acts, No. 168, *amending* LA. CONST.

include a general proportionality requirement, although it continued the 1921 provision as an ordinary statute[67] (which, according to the court, the legislature had since repealed).[68] Moreover, the new Constitution also established a new provision requiring that the assessment of property subject to ad valorem taxation be uniform throughout the state.[69] After reviewing the development of these provisions in considerable detail, the court concluded that the current statutory provision did not invalidate the tax imposed by the city of New Orleans because it applied only to *ad valorem* taxes; that is, taxes imposed "in the form of a percentage on the value of property."[70] By contrast, the New Orleans tax was a *specific* tax, defined as one "imposed as a fixed sum on each article of a class without regard to its value."[71]

The court also rejected two related contentions: (1) that, by increasing the amount of taxes on property subject to ad valorem taxes, the New Orleans tax circumvented the state constitutional provisions limiting the authority of municipalities to impose ad valorem taxes, and (2) that the tax violated the constitution's homestead exemption provisions. Because both provisions applied only to ad valorem taxes, the court concluded that neither provision applied to the specific tax levied by New Orleans. Thus, in view of the charter provision granting the city authority to levy all taxes not expressly prohibited by the state constitution, the court held that the restrictions on the authority of local governments to impose ad valorem taxes on property did not limit the city's authority to

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art. 225 (1913). Since the 1921 constitution merely continued pre-existing law (that is, the 1916 amendment to the 1913 constitution), one should not find it surprising that, as the court noted, the 1921 provision attracted little contemporary attention. 337 So. 2d at 1213. One possible reason for the 1916 change may have been to permit assessment and tax rates for different classes of property, but research into the debate surrounding the 1916 amendment would be necessary to confirm or refute this hypothesis.

67. LA. CONST. art. XIV, § 16.

68. 337 So. 2d at 1213, *citing* 1978 La. Acts, No. 613, § 1; 1975 Acts, No. 170, § 1. The majority seems to have erred on this point. The 1975 statute cited by the court amended and incorporated into the Revised Statutes as section 1958.1 of Title 47 only those portions of article 10 of the 1921 constitution that dealt with timber and forest lands; it did not mention the uniformity requirement of that section. As a result, the 1978 statute, which repealed section 1958.1, would appear to leave the uniformity requirement unaffected.

This factual error does not affect the soundness of the court's basic analysis, however. As noted above, the requirement that property be taxed in proportion in accordance with its value had been eliminated in the 1916 amendment to the 1913 constitution, see note 67, *supra*; and thus, the 1921 provision, which was continued as a statute by the 1974 constitution, does not contain a proportionality requirement.

69. LA. CONST. art. 7, § 18(D).

70. 377 So. 2d at 1213.

71. *Id.*

impose a specific tax on that property. Similarly, the court ruled that the constitution's provision exempting homesteads from certain ad valorem taxes[72] did not immunize that class of property from other taxes that the city was authorized to impose.

The court's discussion of the equal protection challenge to the New Orleans tax addressed two distinct subissues: (1) the general appropriateness of the statutory classification whereby the applicability of the tax was limited to parcels of property separately listed or assessed on the city's tax rolls, and (2) the ability of the city to impose a tax on real property that failed to distinguish between parcels of widely differing values. The first of these issues—the general appropriateness of using the assessor's tax rolls as the basis for a tax classification—gave the court little difficulty. Since the challenged classification neither singled out a suspect class of persons for unfavorable treatment nor infringed on the exercise of a fundamental constitutional right, the court required only that "the classification created by the legislature [bear] a rational relationship to legitimate state purposes"[73] and imposed on the *ACORN* plaintiffs the burden of demonstrating the lack of a legitimate state purpose.[74] Applying this deferential approach to the specific case before it, the court rejected the equal protection challenge to the New Orleans tax because the plaintiffs had failed to carry "their burden of negativing every conceivable basis which might support the City's decision to distinguish between parcels of real property and entities which are not parcels of real property, as a basis for allocating the burden of this tax."[75]

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72. LA. CONST. art. 7, § 20. The homestead exemption does not apply to municipal taxes imposed by municipalities other than the city of New Orleans. LA. CONST. art. 7, § 20(A).

73. 377 So. 2d at 1214. By failing to distinguish between the federal and state equal protection requirements, the court suggested *sub silentio* that the two were identical, of course. *Accord*, Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978). State courts are free to define state guarantees more broadly than the Supreme Court's definition of federal guarantees, even when the wording of state and federal rights is identical, *see* Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980); *see generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); and the Louisiana Supreme Court has occasionally invalidated statutes on state constitutional grounds without considering the applicability of the federal provisions. *E.g.*, Succession of Thompson, 367 So. 2d 796 (La. 1979).

74. 377 So. 2d at 1215.

75. *Id.* The court suggested one rationale the legislature might have accepted:

> It is conceivable that the city might have determined, in attempting to provide a source of additional revenues to meet the ever-increasing demands upon its services to all its citizens, that parcels of real property are particularly easy to identify because of their current presence on the tax rolls, and that the ownership of such parcels is indicative both of some financial stability and of a long term dependency upon those city services which provide a benefit to the owners.

*Id.* at 1215-16.

The second equal protection argument advanced by the plaintiffs was unusual in that it challenged not a legislative discrimination but the failure of the tax to distinguish between the various types of real property listed or assessed on the city's tax rolls. The plaintiffs objected to this failure to discriminate because it caused the tax to have different impacts on different types of property owners; as a result, "the owner of a small residence, of little market value, carries a relatively greater burden with regard to the totality of his assets than does the owner of a large, heavily exploited and highly valued commercial or rental property."[76] In analyzing this issue, the court apparently assumed that the differential impact of the failure to draw distinctions in the statute could amount to a violation of equal protection (although it never stated that assumption explicitly), but the court clearly indicated that such claims would receive only a minimal scrutiny.[77] After quoting extensively from several recent decisions of the United States Supreme Court that upheld various state and federal laws against equal protection challenges,[78] the Louisiana court sustained the New Orleans tax on the ground that it "creates a class of parcels of real estate which has a rational relationship to a legitimate government revenue raising purpose"[79] and treates all parcels within the class equally. Although the court recognized that the tax might have "a disproportionately greater impact upon property owners with fewer financial resources,"[80] it refused to hold that this disproportionate impact

76. *Id.* at 1216.

77. *Id.* The court began by noting two considerations that guided this portion of its analysis of the equal protection issues. First, it refused "to demand that the tax must differentially reflect differences in value" because that requirement would "insist that the tax be what it is not;" that is, an ad valorem rather than a specific tax. Second, it declared erroneous the assumption "that the reasonableness of a classification depends on whether the class is 'natural' or 'unnatural' and 'artificial.'" Since "[a]ll legislative classifications are artificial in the sense that they are artifacts, no matter what the defining trait may be," the court indicated that the proper test was whether the classification "is one which includes all persons who are similarly situated *with respect to the purpose of the law.*" *Id., quoting* Tussman and Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348 (1949). The court then continued with the following observation regarding the classification scheme employed in the New Orleans tax.

> If the purpose of the ordinance is to provide revenues for the city by taxing readily identifiable units, all parcels of real property separately listed and/or assessed on the city's tax rolls are similarly situated with respect to this purpose.

377 So. 2d at 1216.

78. 377 So. 2d at 1216-17, *quoting* Personnel Administration v. Feeney, 442 U.S. 256, 271-72 (1979); New York Transit Authority v. Beazor, 440 U.S. 568, 593 (1979); Vance v. Bradley, 440 U.S. 93, 108 (1979); Dandridge v. Williams, 397 U.S. 471, 485 (1970); San Antonio School District v. Rodriguez, 411 U.S. 1, 24 (1973).

79. 377 So. 2d at 1218.

80. *Id.*

amounted to a denial of equal protection. To remedy any inequity in the tax, the court declared, the citizens of New Orleans had to rely on "the elective and legislative process."[81]

The court's decision in *ACORN* merits commendation for its refusal to imply stringent constitutional limits on the ability of the state's largest city to deal with its pressing financial problems, but the practical application of the decision for other Louisiana local governments is likely to be limited. The constitution grants general taxing power to local governments only "under authority granted by the legislature,"[82] and in the past the court has declined to imply a legislative grant of authority of taxing power even as to local governments with home rule charters.[83] The widespread oposition to new taxes that characterizes contemporary American life makes it unlikely that the legislature will grant or that other local governments will chose to exercise such authority in the near future. Nonetheless, *ACORN* does offer a legal option that may prove politically feasible for some local governments in the more distant future.

In formulating the basic rationale for the refusal to invalidate the New Orleans tax, *ACORN* properly relied on a sound analytical distinction—the difference between ad valorem and specific taxes. The difference is a long-established one;[84] and since the 1974 constitution manifests no clear intention to forbid specific taxes, it seems logical to refuse to apply limitations on ad valorem taxes that would, as a practical matter, eliminate the ability to impose specific taxes. This reasoning is particularly persuasive with regard to the uniformity requirement on which the plaintiffs placed their greatest reliance. The only uniformity requirement in the 1974 constitution is the section requiring uniform assessments of property subject to taxation, and the aim of that requirement was to preclude taxpayers in different parishes from bearing unequal burdens of state ad valorem taxes,[85] not to limit the ability of individual local governments to tax their own citizens.

As a practical matter, the plaintiffs' equal protection challenge

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81. *Id.*

82. LA. CONST. art. VI, § 30.

83. *See* Southern Pac. Transp. Co. v. Parish of Jefferson, 315 So. 2d 619, 621 (La. 1975).

84. *See* BLACK'S LAW DICTIONARY 51 (3d ed. 1933) (definition of ad valorem).

85. For decisions, first unsuccessfully but later successfully, attacking the unequal assessment practices prior to the 1974 constitution, see *Dixon v. Flournoy*, 247 La. 1067, 176 So. 2d 138 (1965), and *Bussie v. Long*, 286 So. 2d 689 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 354 (La. 1974). The legislature repealed the statewide property tax in 1972, and it has not been reinstituted. LA. CONST. art. 10-A, § 1 (1921).

sought to establish, as equal protection doctrine, the very proportionality requirement that Louisiana had eliminated from its state constitution, and the court's deferential approach to both prongs of that challenge merits approval. When a statute neither singles out a politically vulnerable group nor significantly burdens the exercise of the constitutional rights of individuals, American courts generally have afforded the legislature wide latitude, and this deference seems justified in a democratic society where issues of public policy are most appropriately decided via the electoral process. Indeed, this deference is particularly defensible with respect to taxes, because one normally is looking at only one aspect of a total scheme of taxation. Thus, for example, the obvious disproportionate impact of the New Orleans levy seems less onerous when viewed in light of the total tax burden that New Orleans property owners are forced to bear. Not only are private residences assessed at a lower rate than most business and commercial properties,[86] but the dwellings in New Orleans are exempt from ad valorem taxes on the first $50,000 of property value,[87] an immunity worth up to $350 for the individual property owners.[88] In light of this exemption, the New Orleans levy requiring all property owners to pay a minimum tax of $100 seems more reasonable. Although this particular tax falls more heavily on residential property owners, it was not necessarily an unreasonable burden, since business and commercial property with higher assessment rates and no homestead exemption bears a disproportionate percentage of the ad valorem tax burden.

The decisions reached in *Rollins*, *West*, and *ACORN* are basically reasonable, but the opinions—considered as a group—reflect

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86. Originally, the constitution established the following assessment rates for various classes of property

1. Land—10%
2. Improvements for *residential* purposes—10%
3. Other property—15%

LA. CONST. art. 7, § 18(B) (emphasis added). A 1979 amendment, however, added a new class for "public service properties." *See* 1979 La. Acts, No. 799, § 1.

87. LA. CONST. art. 7, §§ 18(B), 20(A)(5); LA. R.S. 47:1703(A) (Supp. 1976). The exemption, as extended by statute, now covers taxes on the first $5,000 of assessed value, and the constitution requires that residential property be assessed at ten percent of its fair market value. Thus, a home worth $50,000 would be assessed at $5,000 and be totally exempted from state and parish ad valorem taxes. The homestead exemption does not apply to municipal ad valorem taxes except for those imposed by the city of New Orleans, thus suggesting an additional justification for New Orleans to impose a minimum tax applicable to all property owners.

88. This dollar figure assumes that the property's value is at least $50,000, the assessment rate is ten percent, and the tax rate is the constitutional maximum of seven mills. If a homestead is worth less than $50,000, the property owner pays no ad valorem tax.

the continued failure of the Louisiana Supreme Court to articulate a coherent framework for analyzing problems involving the authority of local governments. As a result, predictions as to future decisions concerning the extent of local government power remain speculative at best. This uncertainity is particularly regrettable because it is unneccessary. As indicated above,[89] the 1974 constitution articulates general principles that invite the development of a general theory of local government authority. Unfortunately, the court has not yet accepted that invitation.

## PUBLIC EMPLOYMENT

### *Discharges Because of Political Affiliation*

Four years ago the United States Supreme Court first established a constitutional limitation to the patronage system for filling public jobs. In *Elrod v. Burns*,[90] the Court held that the first amendment rights of employees who were not protected by civil service laws precluded the sheriff for whom they worked from discharging them solely "because they did not support and were not members of [the sheriff's political party] and had failed to obtain the sponsorship of one of its leaders."[91] The exact reach of *Elrod* remained uncertain, however, because the Court failed to produce a majority opinion explaining the precise nature of the new constitutional limit on governmental power. Writing for three members of the five-member majority, Mr. Justice Brennan argued that "[l]imiting patronage dismissals to policymaking positions" was adequate to protect the only valid governmental interest served by patronage, that of preventing representative government from being "undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate."[92] On the other hand, Mr. Justice Stewart, whose concurring opinion Mr. Justice Blackmun joined, adopted a test that seemed to leave more room for political patronage; he argued that the new protection should be extended only to "nonpolicymaking, *nonconfidential* government employee[s],"[93] although he concluded that the particular employees involved in *Elrod*—three employees of the process division and a bailiff and a security guard for the juvenile court—were entitled to protection even under his test.

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89. See notes 11-16, *supra*, and accompanying text.

90. 427 U.S. 347 (1976). *See* Note, *Elrod v. Burns: Constitutional Job Security for Public Employees?*, 37 LA. L. REV. 990 (1977).

91. 427 U.S. at 351.

92. *Id.* at 367.

93. 427 U.S. at 375 (Stewart, J., concurring) (emphasis added).

During the 1979-80 term, the Court largely eliminated the possibility that Mr. Justice Stewart's concurring opinion would form the basis for a narrow reading of *Elrod*. In *Branti v. Finkel*,[94] a majority of the Court rejected arguments trying to curb the substantive reach of the first amendment rights on which *Elrod* was based as well as to restrict the class of public employees protected by the decision; specifically, *Branti* held that assistant public defenders fall within the protection of the *Elrod* rule and cannot be dismissed merey because they lack sponsors in the political party that controls the county legislature.

In trying to limit the substantive principles of *Elrod*, the plaintiffs in *Branti* argued that *Elrod* should be applied only to the types of express political coercion involved in the earlier case, that is, asking an employee "to change his political affiliation or to contribute to or work for the party's candidate."[95] The Court refused to adopt this narrow approach to *Elrod* because it would "emasculate the principles" of the earlier decision.[96] Although the restrictive approach would "perhaps eliminate the more blatant forms of coercion described in *Elrod*," it would permit "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job."[97] According to Mr. Justice Steven's majority opinion, the *Elrod* principle was considerably broader; it prohibited all discharges based "solely" on the employee's lack of affiliation with, or sponsorship by, a particular party.

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94. 100 S. Ct. 1287 (1980). Mr. Justice Stewart filed a dissenting opinion relying on his *Elrod* concurrence, which limited the constitutional protection to nonpolicy making, nonconfidential government employees. Under this view, *Elrod* was not controlling "for the simple reason that the respondents here clearly are not 'nonconfidential' employees." 100 S. Ct. at 1296 (Stewart, J., dissenting). Thus, he argued, the public defender "was not constitutionally compelled to enter such a close professional and necessarily confidential association with the [plaintiffs] if he did not wish to do so." *Id.* Mr. Justice Powell filed a dissenting opinion that Mr. Justice Rehnquist joined and Mr. Justice Stewart joined in part. He objected to the "vague and sweeping language" of the majority opinion which, he asserted, was "certain to create vast uncertainty" for "[e]lected and appointed officials at all levels who now receive guidance from civil service laws." 100 S. Ct. at 1297 (Powell, J., dissenting). Even "more fundamentally," he contended that the court erred "in its conclusion that the First Amendment prohibits the use of membership in a national political party as a criterion for the dismissal of public employees," *id.* at 1298, an error that stemmed from the failure to recognize the valid governmental interests served by the patronage system. *Id.* at 1299-1302. Finally, he criticized the court's decision as "anti-democratic because it limit[ed] the ability of the voters of a county to structure their democratic government in the way that they please." *Id.* at 1302.

95. 100 S. Ct. at 1293.

96. *Id.*

97. *Id.* at 1293-94.

The majority also rejected the alternative argument that assistant public defenders do not fall within the class of persons protected by *Elrod*. Conceding "that party affiliation may be an acceptable requirement for some types of government employment" and that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered,"[98] Mr. Justice Stevens nonetheless narrowly defined the reach of this exception to *Elrod*. Abandoning the "policymaking" and "confidential" labels of the *Elrod* opinions, he redefined the "ultimate inquiry" as "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[99] When this standard was used, the majority termed it "manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government."[100] Since "the primary, if not the only responsibility" of such an attorney "is to represent individual citizens in controversy with the state," all the "policymaking [that] occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests," and any confidential information that comes to the attorney out of the attorney-client relationship "has no bearing whatsoever on partisan political concerns."[101] Thus, the Court concluded that making an assistant public defender's tenure depend on his allegiance to the dominant political party "would undermine, rather than promote, the effective performance" of the office.[102]

The overall impact of *Elrod* and *Branti* on local governmental employees in Louisiana is likely to be rather slight. Most employees are already covered by civil service laws that preclude dismissals based on political affiliation,[103] although some persons exempted from the classified service in Louisiana may still be entitled to constitutional protection. One significant exception to the general rule of civil service coverage does exist, however. Neither state nor local

98. *Id.* at 1294.
99. *Id.* at 1295.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See, e.g.* LA. CONST. art. X, § 1 (creation of civil service systems for the state and the city of New Orleans); § 14 (authority for parishes and cities with population over 10,000 to join state system); § 15 (authority for the creation of city and parish civil service systems); § 16 (creation of fire and police civil service system); LA. R.S. 33:711 (1950) (civil service system for cities with commission and city manager form of government); LA. R.S. 33:2391-2433 (1950 & Supp. 1979) (creation of civil service system for cities with a population in excess of 100,000).

civil service laws[104] cover persons employed by the various elected state officials who serve at the parochial level—sheriffs,[105] district attorneys,[106] clerks of court,[107] coroners,[108] and assessors;[109] and those employees traditionally have served at the discretion of the individual officer for whom they work,[110] a euphemistic way of saying that the positions could be used as instruments of political patronage. Under *Elrod* and *Branti*, most of these employees should now receive a limited constitutional protection that forbids making political affiliation a condition of employment.[111] Of course, claiming the protection may be difficult as a practical matter because the employee bears the substantial burden of proving that he was discharge "solely" because of his political beliefs.[112] Nonetheless, the *Elrod-Branti* doctrine may well proscribe the most blatant forms of patronage practices, especially since the plaintiffs in such cases may seek damages under 42 U.S.C. § 1983.[113]

Some employees might still have a sufficiently close relationship to the elected officials to fall within the *Branti* exception per-

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104. LA. CONST. art. X, § 2(B)(10) (exemption of employees of state officers discussed in text from classified civil service).

105. LA. CONST. art. V, § 27. The supreme court has recently attempted to define the status of the sheriff's office. *See* Foster v. Hampton, 352 So. 2d 197 (1977). *See generally Local Government Law—1977-78 Term*, *supra* note 13, at 871-79.

106. LA. CONST. art. V, § 26.

107. LA. CONST. art. V, § 28.

108. LA. CONST. art. V, § 29.

109. LA. R.S. 47:1901 (Supp. 1970).

110. *See, e.g.*, LA. R.S. 16:51 (Supp. 1974) (assistant district attorneys); LA. R.S. 33:1552 (Supp. 1952); 1928-30 Op. La. Atty. Gen. 88 (deputy coroners); Boyer v. St. Amant, 364 So. 2d 1338, 1340 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 1108 (La. 1978) (deputy sheriffs).

111. Both *Elrod* and *Branti* were concerned with a requirement of support by a formally organized political party. However, the rationale on which they rest does not appear to be limited to formal party structures and would seem to preclude a dismissal based on a lack of support within a particular party faction or, indeed, any dismissal based on political affiliation.

112. 100 S. Ct. at 1294. *See* Note, *supra* note 90, at 999.

113. See notes 141-95, *infra*, and accompanying text. The status of these officers under state law as "state officers" who are not subject to the control of any local government may raise serious difficulties for the plaintiff in a suit under 42 U.S.C. § 1983. Although cities and other local governments are amenable to suit under section 1983, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the office of the various state officers is not a local government under Louisiana law. Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Dep't., 350 So. 2d 236, 238-39 (La. App. 3d Cir.), *cert. denied*, 352 So. 2d 235 (1977). Since the eleventh amendment precludes a section 1983 action against the state, the plaintiff would be relegated to an individual action against the officer who fired him, and the officer would presumably be entitled to the good-faith immunity under the statute that the Supreme Court has recognized in a variety of contexts. See note 145, *infra*.

mitting patronage appointments for positions in which political affiliation "is an appropriate requirement for the effective performance of the public office involved."[114] The reach of this exception remains vague, but the examples in *Branti*'s majority opinion indicate that, at a minimum, it covers certain personal assistants of at least some elected public officials.[115] Thus patronage still may be an acceptable basis for hiring persons who handle matters such as public relations or relations with other governmental officials and bodies, but the exact delineation of this class will have to await future litigation.

Perhaps the most difficult general application of *Branti* in Louisiana will involve assistant district attorneys.[116] On the one hand, the analogy to the assistant public defenders in *Branti* (that is, the responsibilities of an assistant public prosecutor are similar to those of an assistant public defender) is a strong one. But one can articulate a distinguishing argument: assistant prosecutors may be involved in policy decisions that, unlike those of defense counsel, concern matters such as the allocation of limited resources, the anticipated deterrent impact of a prosecution, and the overall seriousness of the offense, that go beyond the interests of the persons directly affected by the particular prosecution. In support of this argument, one can cite the consistent practice of the federal government with respect to its prosecutors as a compelling analogy.[117]

Apart from the uncertain reach of the *Branti* exception, the Court's specific decision in the case before it is also questionable. As Mr. Justice Powell persuasively argues in dissent, the underlying assumption of *Elrod* and *Branti*—that a patronage system for allocating public offices does not serve the cause of democracy—is a highly debatable one that many of the strongest American advocates of democracy in the nineteenth century would have denied;[118] thus, it provides a weak foundation for the constitutional doctrine that is being erected upon it. Moreover, the precise issue involved in *Branti*, whether the nature of the relationship between a public defender and his assistants is strengthened by a requirement that all of the attorneys have similar political affiliations, is itself a more

114. 110 S. Ct. at 1295.

115. *Id.* The Court indicated the exception would apply to those assistants of a governor "who help him write speeches, explain his views to the press, or communicate with the legislature . . . ."

116. Under Louisiana law, district attorneys appoint their assistants, who serve at their pleasure. LA. R.S. 16:51 (Supp. 1974).

117. *See* 100 S. Ct. at 1298 (Powell, J., dissenting).

118. *Id.* at 1296-97.

difficult problem than the Court's opinion would suggest. By focusing exclusively on the individual attorney's duty to his clients,[119] the Court ignores the possibility that the professional members in the office may well be called upon to play a broader role (perhaps, for example, with speeches to the public) with respect to issues that concern the function or the political status of the office. Not only does the vision, expressed in Mr. Justice Stewart's dissent,[120] of the public defender's office as a public equivalent of the private law firm seem more realistic, but it also offers a more professional role for the attorneys who serve in the office. And if that vision of the public defender's office is a valid one, surely Mr. Justice Stewart is right when he argues that one can identify "few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association."[121]

*Strikes by Public Employees*

Labor disputes between public employees and the local governments for which they work have become a common feature of American life, and dissatisfied employees, in Louisiana and elsewhere, have increasingly resorted to strikes as one method of obtaining satisfactory responses from their employers. The best-known example of this trend in Louisiana was the New Orleans police strike in 1979. In addition to forcing the cancellation of most Mardi Gras festivities for the year, it also required Louisiana courts to take some preliminary steps toward defining the legal consequences of such a work stoppage in this state.

As one method of exerting pressure on the police union to end the strike, the city initiated a legal action seeking a declaration that the strike was illegal and an injunction prohibiting the strike. The civil district court granted the injunction, and the fourth circuit affirmed that decision in *City of New Orleans v. Police Association of Louisiana (Police Association I)*.[122] The appellate court began its opinion by noting that "every state that has considered the question has decided that, in the absence of a statute governing public employee strikes, public employees have no right to strike or

119. *Id.* at 1295.

120. 100 S. Ct. at 1296 (Stewart, J., dissenting).

121. *Id.*

122. 369 So. 2d 188 (La. App. 4th Cir.), *cert. denied*, 376 So. 2d 1269 (La. 1979). The injunction ordered the union and its officers to direct the members to return to work and ordered the members to stop striking. It did not, however, order any individual police officer to return to work, presumably because no officer had a duty to accept employment with the city. 369 So. 2d at 190 n.3.

engage in work stoppages,"[123] but it ultimately chose to rest its holding on the narrower ground that "a strike by police officers must be prohibited" because it "not only leaves society defenseless against crime but even inspires lawlessness."[124] The court carefully distinguished the impact of a police strike from that of a strike in the private sector; it insisted that while "[s]triking employees of a private business can bring their employer to his knees without endangering the public health and safety," a police strike "takes law enforcement and consequently the rule of law itself from our society."[125] Although the court acknowledged that police officers, like other government employees, are guaranteed rights of speech, assembly, and petition,[126] it concluded that enjoining a strike does not deprive police officers of any of those rights. The court recognized that depriving police unions of the right to strike, "the employees' ultimate weapon in collective negotiations," placed them at a disadvantage in collective bargaining, but it nonetheless held that police strikes must be held illegal because of "the overriding concern for public safety, health and welfare."[127]

The city subsequently sought a contempt order punishing the union for its failure to obey the injunction ordered in *Police Association I*.[128] The civil district court found the union guilty of contempt and fined the union $600,000. In *City of New Orleans v. Police Association of Louisiana (Police Association II)*,[129] the fourth circuit affirmed the finding of guilty but reduced the fine to $500. The fourth circuit reduced the fine notwithstanding its declaration that "the actions of the union, even measured in dollars alone, caused

123. 369 So. 2d at 188, *citing* Annot., LABOR LAW: RIGHT OF PUBLIC EMPLOYEES TO STRIKE OR ENGAGE IN WORK STOPPAGE, 37 A.L.R.3d 1147, 1156-57 (1971).

124. 369 So. 2d at 189.

125. *Id.* The court conceded that its rationale would not apply to all government employees: "In respect to their threat to society's existance, for example, the difference between strikes by police and by museum employees is obvious. Society can tolerate the temporary closing of a museum, but not the suspension of law." *Id.* at 189-90.

126. *See* Tassin v. Nat. Union of Police Officers, 311 So. 2d 591 (La. App. 4th Cir. 1975). *See also* Elrod v. Burns, 427 U.S. 347 (1976); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). *See generally* Comment, *Public Employee Collective Bargaining in Louisiana*, 34 LA. L. REV. 57 (1973).

127. 369 So. 2d at 190.

128. Originally, the city sought contempt citations against the union's officers and directors as well as against various other individual police officers. The charges against all of the individuals except the officers and directors were dismissed at the request of the city, and the civil district court granted a motion to quash the charges against the officers and directors. City of New Orleans v. Police Ass'n of La., 371 So. 2d 638, 639 (La. App. 4th Cir.), *cert. denied*, 374 So. 2d 658 (La. 1979).

129. 371 So. 2d 638 (La. App. 4th Cir.), *cert. denied*, 374 So. 2d 658 (La. 1979).

losses far in excess of the amount of the fine" and its belief "that a materially smaller fine would most certainly be no deterrent to future actions by organizations or associations which illegally choose to disregard court orders."[130] According to the court of appeals, the only statutes granting the trial court authority to punish the union permitted a maximum fine of $500 to be imposed on "a person adjudged guilty of contempt of court."[131] It specifically rejected the trial court's method of using the $500 figure to establish the $600,000 fine "by multiplying $500 by 1200, the latter figure being his estimate of the numbers of union members who jointly and in their collective capacities had violated the . . . injunction."[132] Since an unincorporated association can be sued in Louisiana[133] and the contempt charges against individual union members previously had been dismissed,[134] the union remained as the only defendant and was, therefore, "the 'person' referred to in [the statute]."[135] Thus, the district court was bound by the $500 maximum "[r]egardless of how small the maximum amount of the fine permitted by that article and that statute may be by comparision to what would be a more appropriate amount in light of the contempt committed here . . . ."[136]

Both decisions of the court of appeal appear correct. A concerted refusal of public employees to provide essential governmental services[137] attacks the very basis of civilized society, especially in urban areas. Thus, it seems reasonable to declare, as the court did in *Police Association I*, that such strikes are unlawful in the absence of legislation permitting them. But the court also wisely refused, in *Police Association II*, to rely on the lack of an adequate judicial remedy as the basis for an expansive interpretation of the punishment provided for contempt of court. The exercise of the court's contempt power involves summary proceedings that lack some of the protections normally afforded to lawbreakers in criminal pro-

130. *Id.* at 640.

131. *Id.*, *quoting* LA. R.S. 13:4611(A)(2) (Supp. 1972). In its opinion on rehearing, the court, relying on section 2 of Article V of the Louisiana Constitution, rejected the concept that courts have an inherent contempt power that the legislature cannot regulate. 371 So. 2d at 641.

132. 371 So. 2d at 640.

133. LA. CODE CIV. P. arts. 689 & 738.

134. See note 128, *supra*.

135. 371 So. 2d at 641.

136. *Id.*

137. This argument would not necessarily preclude strikes by all public employees since not all services provided by local governments are equally essential to functioning social order. *Accord*, 369 So. 2d at 189-90. It would apply to such basic services as those provided by police, fire, and sanitation departments.

ceedings.[138] Thus, although expansion of this power might at first seem a desirable way of overcoming the legislative neglect to provide adequately for strikes in the public sector, such an expansion would conflict with a considered legislative decision to confine within narrow boundaries a power with considerable potential for abuse.

Considered together, the two New Orleans cases reflect the limited role that the judiciary can play in solving labor disputes in the public sector. The form of injunctive relief available,[139] the limited punishment provided for contempt, and the reluctance to punish individual employees once they have returned to work operate, as a practical matter, to limit the role of the courts. More fundamentally, the lack of adequate remedies reflects the inability of the political system of contemporary America to reach a consensus as to a means for resolving these impasses. Indeed, the legal proceedings were relatively unimportant in the ultimate failure of the New Orleans strike to achieve its goal. Basically, that failure stemmed from the governor's willingness to use state authority, in the form of the state police and the national guard, to maintain a minimum level of public order during the strike. Moreover, since the legislature has remained unwilling or unable to formulate a general procedure for resolving the labor disputes that are virtually certain to plague the public sector in the future,[140] the willingness of the state's chief executive to use state resources to back local government employers is likely to continue to be the decisive factor in determining whether those employers will prevail when all attempts at local compromise fail.

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138. *See* LA. CODE CIV. P. art. 225. The comments of the revising commission make explicit the intention to deny a trial by jury to the person charged with contempt. LA. CODE CIV. P. art. 225, Comment (b).

139. See note 128, *supra*.

140. In fairness to the legislature, one should note that no state has yet devised a completely satisfactory system for handling labor disputes in the public sector. Elected officials of local governments generally object to binding arbitration because it invades their perogatives as the elected representatives of the people and thus impairs the democratic process. A second proposal has been to impose various penalties on the strikers (either individually or through their union), but these laws generally have proven to have limited value because of the government's desire to avoid the continuing ill feeling that post-strike punishment engenders. One self-enforcing mechanism that has not been tried is the creation of a tort remedy to individual members of the community who are harmed by the strike, thus permitting local businesses to recover damages. Probably because it cannot be controlled by the political process (that is, the local government could not force the businesses to abandon their legal actions as part of a strike settlement), it has not yet been a politically viable option in any state.

## TORT LIABILITY

### *Civil Rights Violations*

As recently as 1978, lawsuits based on 42 U.S.C. § 1983 for alleged violations of civil rights presented relatively few problems for local governments exercising general governmental powers.[141] *Monroe v. Pape*[142] held that the federal statute did not apply to municipalities, thus totally immunizing them from suit; and subsequent decisions afforded comparable immunity to counties.[143] Moreover, although local officials acting "under color of law" could be held personally liable in section 1983 actions,[144] the United States Supreme Court had, in a variety of contexts, recognized an immunity doctrine that protected officials so long as they acted in good faith.[145]

The erosion of the protection afforded local governments began two years ago with *Monell v. New York City Department of Social Services*,[146] which overruled *Monroe* and held that local governments were "persons" covered by the statute. Although *Monell* stopped short of imposing vicarious liability on local governments for all constitutional violations committed by their employees,[147] it did hold that

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141. Numerous decisions had assumed, without explicitly considering the issue, that school boards were covered by the statute. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). *See generally* Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 663 (1978); 436 U.S. at 710-11 (Powell, J., concurring).

142. 365 U.S. 167 (1961).

143. *E.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Monroe v. Pape, 365 U.S. 167 (1961).

144. *E.g.*, Aldinger v. Howard, 427 U.S. 1 (1976); Moor v. County of Alameda, 411 U.S. 693 (1973). None of the challenges in these cases expressly sought a reversal of *Monroe*. Monell v. Dept. of Social Services of the City of New York, 436 U.S. at 710 & 710 n.7 (Powell, J., concurring).

The Supreme Court also recognized an analogous, non-statutory cause of action against federal officials who violated the constitutional rights of citizens. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

145. *E.g.* Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (superintendent of state hospital); Wood v. Strickland 420 U.S. 308 (1975) (school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (state executive officers performing discretionary acts during the course of their employment). For prosecutors when they were presenting the state's case, for judges, for legislators the Court recognized an absolute immunity. *See* Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

146. 436 U.S. 658 (1978).

147. *Id.* at 691.

a local government would be liable when the violation occurred as the result of an established governmental policy.[148] In abolishing the absolute immunity rule of *Monroe*, the *Monell* decision left open the possibility that governments might be entitled to a good-faith immunity analogous to that granted to employees;[149] but the recent decision in *Owen v. City of Independence*[150] eliminated that possibility by holding that a local government is always liable for the damage resulting from its unconstitutional policies.

Emphasizing that "the question of the scope of a municipality's immunity under §1983 is essentially one of statutory construction,"[151] Mr. Justice Brennan's majority opinion in *Owen* gave several reasons for rejecting good-faith immunity as a matter of statutory construction: (1) "the language of the statute itself," language that, he argued, created "'a species of tort liability that on

148. *Id.*

149. *Id.* at 701.

150. 100 S. Ct. 1398 (1980). Mr. Justice Powell dissented in an opinion that the Chief Justice and Justices Stewart and Rehnquist joined. 100 S. Ct. at 1419-32 (Powell, J., dissenting). The dissent argued that the majority had erred both in its determination that the city had violated the plaintiff's constitutional rights and its refusal to recognize a good-faith immunity for local governments.

According to Mr. Justice Powell, "[c]areful analysis of the record supports the District Court's view that [the plaintiff] suffered no constitutional deprivation," *id.* at 1419, because "nothing in [his] actual firing cast such a stigma on [the plaintiff's] professional reputation that his liberty was infringed." *Id.* at 1421. The only arguably stigmatising comments were made by an individual councilman, but those statements "provide[d] no basis for this action against the city" since *Monell* precluded imposing liability "on a theory of *respondeat superior*." *Id.* at 1422.

With respect to the majority's refusal to recognize the good-faith immunity, Mr. Justice Powell argued that the majority conclusion that the Congress that adopted the Civil Rights Act of 1871 "silently rejected common-law municipal immunity" was inconsistent with its previous refusals to find a silent abrogation of executive immunities. *Id.* at 1424. Moreover, it conflicted with several "[i]mportant public policies" including the separation of powers notion that "some governmental decisions should be at least presumptively insulated from judicial review," *id.*; "basic fairness," which includes "the idea that liability should not attach unless there was notice that constitutional right was at risk," *id.* at 1425; and the reality "than many local governments lack the resources to withstand substantial unanticipated liability under § 1983;" *Id.* The dissent declared that the majority opinion searched "at length—and in vain—for legal authority to buttress its policy judgment." *Id.* at 1426. It particularly disputed, in a length discussion of the significance of the legislative history, the suggestion that the majority could find any "support for its position in the debates on the civil rights legislation that included § 1983," *id.*, and emphasized that the court's decision ran "counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions." *Id.* at 1428. Finally, Mr. Justice Powell questioned the majority's approach because it "conflict[ed] with the current law in 44 States and the District of Columbia," all of which "provide municipal immunity at least analogous to a 'good faith' defense against liability for constitutional torts." *Id.* at 1430.

151. 100 S. Ct. at 1407.

its face admits of no immunities,"'[152] (2) the congressional debates, which confirmed "the expansive sweep of the statutory language";[153] (3) the absence of any "tradition of immunity . . . so firmly rooted in the common law and . . . supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine'";[154] and (4) the increased acceptance of "equitable loss-spreading" as a principle of tort law.[155]

A significant portion of the majority opinion is devoted to refuting the suggestion that any tradition of municipal tort immunity justified a good-faith immunity for municipalities under section 1983. Basically, the Court's survey of nineteenth century decisions convinced it that the question "of a qualified immunity based on the good faith of municipal officers" was seldom mentioned.[156] But the Court asserted that "where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful."[157]

Mr. Justice Brennan conceded that American tort law of the nineteenth century did extend two forms of immunity to local governments: for actions taken in a "governmental" rather than a "proprietary" capacity and for "discretionary" as opposed to "ministerial" acts. He concluded, however, that neither immunity supported the adoption of a good-faith immunity for local governments under section 1983. With respect to the immunity for governmental functions, he argued that the derivation of the immunity from the doctrine of sovereign immunity suggested at least two reasons for rejecting it "as the basis for the qualified privilege [the city] claims under § 1983":[158] (1) since sovereign immunity was an absolute immunity within the areas it covered, "the presence or absence of good faith is simply irrelevant";[159] and (2) "more fundamentally," any immunity deriving from sovereign immunity is abrogated "by the sovereign's enactment of [section 1983] making [the local government] amenable to suit."[160] Mr. Justice Brennan also rejected the immunity for discretionary acts as an appropriate source for a good-faith immunity. In actions brought under section

152. *Id.*
153. *Id.* at 1408.
154. *Id.*
155. *Id.* at 1419.
156. *Id.* at 1410.
157. *Id.*, *citing* Thayer v. Boston, 19 Pick. 511, 515-16 (Mass. 1837). For a criticism of this reliance on *Thayer*, *see* 100 S. Ct. at 1430 (Powell, J., dissenting).
158. 100 S. Ct. at 1413.
159. *Id.*
160. *Id.* at 1413-14.

1983, a court passing judgment does not, he argued, "seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations";[161] it simply enforces constitutional requirements, which the municipality has no discretion to disobey.

The majority also attempted to justify its decision on the broader grounds of "the legislative purpose in enacting the statute and . . . considerations of public policy."[162] The central aim of the Civil Rights Act of 1871 (from which section 1983 derives) was, the Court declared, to create a remedy for those persons who had been wronged by the misuse of power that ultimately is based on the authority of the state, and it would be "uniquely amiss' to allow the government itself "to disavow liability for the injury it has begotten."[163] Terming the availability of a damage remedy "a vital componenent of any scheme for vindicating cherished constitutional guarantees,"[164] Mr. Justice Brennan concluded that creating a good-faith defense for local governments would substantially limit the damage remedy under section 1983; because good faith already had been recognized as a defense in suits against individual officers, "many victims of municipal malfeasance would be left remediless if the [local government] were allowed to assert a good-faith defense."[165]

In addition to remedying past abuses, Mr. Justice Brennan argued that denial of the good-faith defense would also serve the broader statutory purposes by deterring "future constitutional deprivations" through the creation of "an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[166] Nor did the majority discern in suits against governmental units either of the two "overriding considerations of public policy" that prompted the qualified immunity defense in cases seeking to impose liability on individuals—the injustice of holding an individual personally liable for exercising discretion that he is required to exercise by the obligations of his position, and the danger that personal liability

161. *Id.* at 1415.

162. *Id.*

163. *Id.* This language seems somewhat of a hyperbole as applied to local governments, since neither states nor the federal government are subject to liability under section 1983. *See* 100 S. Ct. at 1425 n.12 (Powell, J., dissenting).

164. 100 S. Ct. at 1415.

165. *Id.* at 1416.

166. *Id.* Mr. Justice Powell's dissent, 100 S. Ct. at 1425 n.9, points out that this claim is inconsistent with the majority's argument, 100 S. Ct. at 1416, that its decision will have no impact on the functioning of local governments.

would deter officers from executing their offices "with the decisiveness and the judgment required by the public good."[167] As for the alleged injustice of personal liability, it was "simply not implicated when the damage award comes not from the official's pocket, but from the public treasury."[168] Similarly, the possible inhibiting effect that potential liability might have on an official's decisiveness and judgment is "significantly reduced, if not eliminated . . . when the threat of personal liability is removed."[169] Any remaining apprehension about the local government's potential "liability for constitutional violations is quite properly the concern of its elected or appointed officials,"[170] who should always consider whether their decision comports with constitutional mandates.

Ultimately, however, the Court chose to base its decision on risk-distribution principles. Rejecting "blameworthiness" as "the acid test of liability," the majority advocated using "the principle of equitable loss-spreading" as well as fault in deciding how to distribute "the costs of official misconduct."[171] It argued that the *Owen* decision "properly allocate[d] these costs among the three principals" in a 1983 action by assuring the victim of compensation, by protecting the offending official from personal liability "so long as he conducts himself in good faith," and by forcing the public to bear liability only when the official's "edicts or acts may fairly be said to represent official policy."[172]

The refusal to establish a good-faith immunity merits qualified approval. But most of the arguments that Mr. Justice Brennan advanced to support it are makeweights, and the application of the rule in the specific case before the Court was a dubious one. The basic reason for rejecting the good-faith immunity defense for local governments is the risk-distribution argument articulated at the very end of the majority opinion. Its basic premise is a widely accepted principle in modern American tort law; to wit, in deciding whether an injured party or the one causing injury should bear the cost of an injury, one should place the loss on the party that is best able to spread it among the community at large, at least in the

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167. 100 S. Ct. at 1417, *quoting* Scheur v. Rhodes, 416 U.S. 232, 240 (1974).

168. 100 S. Ct. at 1417. That the Court did not completely abandon a moral basis for its decision is shown by the reference to "[e]lemental notions of fairness [which] dictate that one who causes a loss should bear the loss." *Id.* Of course, American tort law has never recognized any such principle that would make an individual responsbile for damages caused by his lawful conduct.

169. *Id.* at 1418.

170. *Id.*

171. *Id.* at 1419.

172. *Id.*

absence of strong policy reasons calling for imposing it on the other party.[173] Since the overriding policy reasons that lead to the adoption of the qualified immunity in actions seeking to impose personal liabiity on officials—unfairness to the official and the potential adverse impact on the performance of public officials—apply with much less force in actions against the government itself, the general principle requires imposition of liability on the government even when the policy causing injury was adopted in good faith. In effect, the Court decided, quite properly in this observer's estimation, that actions against local governments are a useful way of transferring from the injured party to the community at large the risk of injury resulting from constitutional violations.

The other arguments advanced in the majority opinion are not very convincing. In the first place, Mr. Justice Brennan's rejection of the traditional tort immunities applicable to local governments as a valid base for developing a good-faith immunity under section 1983 misconstrues the nature of the argument advanced by the proponents of the immunity. The argument that the existence of the nineteenth-century immunities counsels adoption of a good-faith immunity under section 1983 does not, as Mr. Justice Brennan suggests,[174] indicate that the good-faith immunity was logically derived from either of the nineteenth-century immunities. Instead, the proponents of immunity urged that the existence of the earlier immunities justified an inference that the Congress that adopted section 1983 did not intend to impose unqualified liability on local governments. Thus, they argued, the Court's development of doctrinal limits on liability was consistent with the underlying congressional purpose.[175]

In addition to misconstruing the argument relying on the nineteenth century immunities, the majority opinion also distorts the history of the immunity doctrines during the nineteenth century. To suggest that by 1871 the general rule of tort law was liabiltiy for all actions of local governments with minor exceptions permitting immunity for "governmental" and "discretionary" actions[176] is to rewrite history. As Mr. Justice Powell points out in dissent,[177] the general

173. New Zealand's Accident Compensation Act, 1972 N. Zealand Acts, No. 43, has carried this concept, which forms the basis for such contemporary proposals as no-fault insurance for automobile accidents, to its logical conclusion by eliminating traditional tort liability for all accidential infliction of personal injury and substituting therefor a general compensation scheme.

174. 100 S. Ct. at 1413.

175. 100 S. Ct. at 1423-24, 1428-30 (Powell, J., dissenting).

176. 100 S. Ct. at 1410-15.

177. 100 S. Ct. at 1428-30 (Powell, J., dissenting).

rule of the nineteenth century was immunity for local governments, although the exceptions for "proprietary" and "mandatory" acts modified the immunity principle in certain situations.[178]

This misreading of history also forms the basis for the majority's questionable reliance on legislative history and the broad language of the statute. Basically, the majority relies on the remedial nature of the Act and the failure of opponents to suggest that the liability imposed on local governments was anything less than absolute. That approach seems less than persuasive if a general immunity for local governments existed at the time Congress was legislating. A more natural interpretation of the silence would be to conclude that Congress did not mean to "impinge on a tradition so well grounded in history and reason by covert inclusion in the general language"[179] of the statute.

If, as this critique urges, the justification for the rejection of the good-faith immunity stems principally (and perhaps solely) from a risk-distribution analysis, one can suggest some logical qualifications to the general approval the Court's approach deserves. These qualifications stem from a recognition that local governments offer a less than totally satisfactory method of risk distribution because of the stringent financial limits under which they operate.[180] As a result of these limits, the real choice for a local government is often not between visiting the loss on the individual party or forcing all members of the community to bear a proportionate share of the loss but between forcing the injured party to bear all or some part of the loss or cutting back services generally available to the public.

At least two qualifications seem to follow from any appreciation of the realities of local government finance. First, the Court should be sensitive to the need to limit the nature of damages recoverable from local governments. The Court has taken a good first step in this direction in *Carey v. Piphus*,[181] by allowing only nominal

178. *See generally* Greenhill & Murto, *Governmental Tort Immunity*, 49 TEX. L. REV. 462, 463 (1971); Kramer, *The Government Tort Immunity Doctrine in the United States: 1790-1955*, 1966 U. ILL. L. F. 795, 815-18. for a comprehensive survey of the precedents through the early twentieth century, *see* Borchard, *Government Liability in Tort (Pts. I-III)*, 34 YALE L. J. 129, 229 (1924).

179. 100 S. Ct. at 1408, *quoting* Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

180. Because of the spreading of the risk and the fewer limits on taking authority, either the states or the federal government would provide better means of risk-distribution, but neither is covered by section 1983. See note 163, *supra*. Insofar as fault retains some influence as a basis for liability, the argument for imposing liability on local governments is even more persuasive, *see Local Government Law—1977-78 Term*, *supra* note 13, at 875-76; but so is the argument for a rule giving new constitutional pronouncements prospective effect only.

181. 435 U.S. 247 (1978).

damages in 1983 actions for procedural errors that do not infringe upon substantive rights or cause economic loss to the plaintiff. Perhaps the greatest need for the future is to articulate doctrines that will hold non-quantifiable general damages for pain and suffering, mental anguish, humiliation, and the like within reasonable bounds. Such an approach will strike an appropriate balance between visiting great economic loss on an injured party and forcing a local government to choose whether to satisfy its tort obligations or to provide essential services to the community.

As a second qualification stemming from an appreciation of the difficult financial position of local governments, the Court should limit liability to situations where the government's policies violated the Constitution when the complainant suffered injury. Not only is it unfair to burden the already strained treasuries of local governments for actions that were lawful when taken, but the equities on the side of a person who is injured by the lawful policies of the government seem much less compelling. To hold otherwise is to suggest that the government is responsible for compensating all individuals harmed by its actions, surely a considerable expansion of the *Owens* principles.[182] One should emphasize that this qualification is much narrower than the good-faith immunity rule advocated in the *Owen* dissent; it urges that local governments deserve protection from a retroactive application of new constitutional requirements, not that they should be immunized for all honest mistakes. Essentially, this second qualification adopts the prospectivity rule adopted by most state courts (except in the case where the new doctrine was established) as they abolished various immunity doctrines during the course of the past several decades,[183] a doctrine that generally has been endorsed as a fair compromise of the competing goals of compensating victims and of protecting local governments from unanticipated financial burdens that might have catastrophic consequences.[184]

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182. Indeed, such a principle would offer a striking contrast to the Court's refusal to expand the federal government's liability under the Federal Tort Claims Act beyond the relatively narrow bounds of negligence. *See* Laird v. Nelms, 406 U.S. 797 (1972). *See generally* Keenan, *Nelms v. Laird: Absolute Liability Shattered by Sonic Boom*, 16 A.F.L. REV. 29 (Winter 1974).

183. *See, e.g.*, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Molitor v. Kaneland Comm. Unit School Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). The United States Supreme Court has held that a state may constitutionally announce a rule that is entirely prospective. Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

184. *See* 100 S. Ct. at 1425 n.11; Molitor v. Kaneland Comm. Unit School Dist., 18 Ill. 2d 11, 41-42, 163 N.E.2d 89, 104 (1959) (immunity abrogated in a suit involving a school bus carrying 18 children); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 958 (1976).

This second qualification leads naturally to criticism of the Supreme Court's actual decision in *Owen*. Since Police Chief Owen was fired before the 1972 Supreme Court decisions establishing the constitutional principle on which the police chief challenged his discharge,[185] the argument of Mr. Justice Powell's dissent[186] that liability was being foisted on the city for actions that were legal when they were taken seems correct. At the very least, the majority should have attempted to demonstrate that prior decisions had sufficiently established the principle to justify retroactive application of the 1972 decisions.[187]

The impact of *Owen* is likely to be considerable. The decision indicates the need for insuring that all official policies of local governments are reviewed by a competent attorney before they are implemented, as well as for conducting a continuing review of existing policies to make certain that they satisfy current constitutional requirements.[188] Moreover, as Mr. Justice Brennan clearly intended,[189] attorneys conducting such reviews probably should err on the side of protecting individual rights, since the financial consequences for the city (not to mention the malpractice exposure of the attorney) could be considerable if one mistakenly failed to afford protection to a right that the Supreme Court later upheld as entitled to constitutional protection.

One safely can predict an increasing number of section 1983 actions against local governments as litigants force the Court to delineate the precise paramenters of the liability that the *Monell* and *Owens* decisions have imposed.[190] The Louisiana experience in abolishing governmental immunity is illustrative of the problems that can be anticipated, for abolishing the traditional immunity has proved to be only the initial step in resolving what local governments should be responsible to what injured parties for what types of acts.[191]

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185. Board of Regents v. Roth, 408 U.S. 564 (1972). Police Chief Owen alleged that public statements made at the time of his dismissal created a defamatory impression that required the city to conduct a hearing.

186. 100 S. Ct. at 1421 (Powell, J., dissenting).

187. The majority's only discussion of whether Owen's substantive rights were violated is found in a footnote. 100 S. Ct. at 1406 n.13.

188. A one-time review of existing policies will not suffice because the limits of the various constitutional rights involved change over time.

189. 100 S. Ct. at 1416.

190. As one example, the Court will have to define exactly what injuries can properly be said to result from official governmental policy.

191. For illustrations of some of the recent Louisiana problems, *see The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Local Government Law*, 40 LA. L. REV. 681, 710-16 (1980) [hereinafter cited as *Local Government Law—1978-79*

*Owen* also may serve, by way of analogy, as a model in other cases involving the potential tort liability of governments. To the extent that its risk-distribution principles form a convincing basis for decision, it may encourage states, like Louisiana, that have abolished the immunity of governmental units for nonconstitutional torts to develop official immunity doctrines that will protect individual officers from liability while at the same time insuring compensation to the injured victim.[192] *Owen* also suggests reexamination of some judicially developed limits on the liability of the federal government under the Federal Tort Claims Act.[193] For example, the decision of the Court of Appeals for the Fourth Circuit to immunize the government whenever the official immunity doctrine would immunize an individual officer[194] appears completely inconsistent with the *Owen* rationale. More fundamentally, the Court might seek to restrict the discretionary function exception of the Act,[195] which seems questionable when analyzed from a risk-distribution point of view, since imposing liability on the federal government seems an appropriate vehicle for spreading even catastrophic losses.

*Identification of the Responsible Governmental Entity*

At the state level, the past year has seen further litigation aimed at determining who is liable for the acts of various public servants. In *Foster v. Hampton (Foster II)*,[196] the Louisiana Supreme

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*Term*]; *Local Government Law—1977-78 Term*, *supra* note 13, at 869-79; *The Work of the Louisiana Appellate Courts for the 1976-1977 Term*, 38 LA. L. REV. 462, 474-82 (1978) [hereinafter cited as *Local Government Law—1976-77 Term*].

192. Louisiana has achieved essentially the same result for school officials by requiring school boards to idemnify officials held liable in tort so long as the official does not act maliciously or intentionally injure the plaintiff. LA. R.S. 17:416.1(B) (Supp. 1975). *See* McKinney v. Greene, 379 So. 2d 69 (La. App. 3d Cir. 1979), *cert. denied*, 381 So.2d 1233, 1235 (La. 1980). For an unsuccessful attempt, under Louisiana law, to protect individual officers while imposing liability on the municipal employer, see Judge Redman's dissent in *Gordon v. City of New Orleans*, 363 So. 2d 235, 242 (La. App. 4th Cir.), *aff'd per curiam*, 371 So. 2d 768 (La. 1979).

193. 28 U.S.C. §§ 1346, 2671-80 (1976).

194. Norton v. United States, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). Far more consistent with the *Owen* rationale is Judge Butzner's dissent, which argued that "[n]o principle of common law, no statute or decisional precedent, either state or federal, authorizes the government to substitute its officer's personal immunity for the sovereign immunity, which an Act of Congress waives." 581 F.2d at 398 (Butzner, J., dissenting).

195. 28 U.S.C. § 2680(a) (1970). *See* Dalehite v. United States, 346 U.S. 15 (1953). Still another rule seemingly inconsistent with the risk-distribution approach is the refusal to hold the government liable under modern concepts of strict liability. *See* Laird v. Nelms, 406 U.S. 797 (1972).

196. 381 So. 2d 789 (La. 1980). Justices Marcus and Blanche dissented. Mr. Justice Marcus' dissenting opinion argued that, since the state was not a party in *Foster I*,

Court converted to an explicit holding its dicta in *Foster I*,[197] which declared that a deputy sheriff was an employee of the state rather than of the sheriff for whom he worked or of the parish within whose boundaries he served. Moreover, the court also held that filing a suit against the deputy sheriff interrupted prescription against the state. Overruling the 1948 decision of *Cox v. Shreveport Packing Company*,[198] the court abandoned the distinction between perfect and imperfect solidarity[199] and ruled that, since an employer's liability for the acts of his employee "has been recognized as a solidary one," the person injured "has only one cause of action against both, and suit against either the employer or the employee will interrupt prescription as to the other."[200]

At least one recent decision by a court of appeal indicates a willingness to read extremely broadly the portion of the *Foster I* holding that relieves sheriffs of vicarious liability for most torts committed by their deputies. In *Nolen v. State*,[201] the third circuit upheld, on an exception of no cause of action, dismissal of the sheriff as a defendant in a suit arising out of the alleged failure of two deputies to prevent a shooting. Despite allegations that the sheriff had been guilty of negligence in the hiring, training, and supervision

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"the statement therein that the state may be considered the deputy sheriff's employer was dicta" and should not be followed. 381 So. 2d at 791 (Marcus, J., dissenting). On more mature consideration, he concluded that the deputy was "an employee of the sheriff who is an officer of the state" and that the state should not "be responsible for the actions of constitutionally empowered officials and their employees." *Id.* In view of this conclusion, he did not address the issue of whether *Cox v. Shreveport Packing Co.*, 213 La. 53, 34 So. 2d 373 (1948), should be overruled.

The dissent's attempt to distinguish *Foster I* was only half persuasive. Although the statement that the state was the deputy sheriff's employer was dicta, the dissent's position—that the sheriff was his employer—conflicted with the holding of *Foster I.*

197. 352 So. 2d 197 (La. 1977); for an analysis of the *Foster I* decision, *see Local Government Law—1977-78 Term, supra* note 13, at 871-79.

198. 213 La. 53, 34 So. 2d 373 (1948).

199. *See* Cline v. Crescent City R.R. Co., 41 La. Ann. 1031, 6 So. 851 (1889). Cline defined imperfect solidarity as solidarity in which the parties are bound for the same thing but not on the same basis. *Foster II* rejected the distinction between perfect and imperfect solidarity because it lacked any statutory basis. 381 So. 2d at 791.

200. 381 So. 2d at 791.

201. 377 So. 2d 586 (La. App. 3d Cir. 1979). Judge Swift filed a dissenting opinion that Judge Guidry joined. He argued that neither *Foster I* nor R.S. 33:1433 protected the sheriff because the plaintiff based his suit not "on any vicarious liability of the sheriff for the negligence of the deputies" but on the contention that the sheriff was "himself a joint tortfeasor by reason of his *own* independent negligence." 377 So. 2d at 589 (Swift, J., dissenting) (emphasis in original). Since the statutory protection imposed a limited vicarious liability on the sheriff, it was unreasonable to interpret it also as manifesting a legislative intention "to relieve him from liability for his own negligent acts or omissions," and the dissent argued, therefore, that "the petition states a cause of action in this respect." *Id.*

of his deputies, as well as in the adoption of law enforcement procedures, the appellate court nonetheless ruled that "[t]he trial court was correct in finding no personal or individual cause of action against the sheriff upon this basis."[202] A proper interpretation of *Foster I* and R.S. 33:1433,[203] the court asserted, limited the sheriff's liability for the actions of his deputies to situations in which he was personally present or personally directed the specific conduct that injured the party who is complaining.[204] Moreover, the court was unwilling to find that the allegations in the plaintiff's petition were sufficient to establish that the sheriff had breached any duty that the law imposed on him. Although the court recognized that "Louisiana Constitutional and statutory provisions mandate the performance of varied ministerial duties by the sheriffs," it professed an inability to discover any provisions requiring the sheriff to hire only qualified persons as deputies, imposing on a sheriff the duty to train his deputies properly, or directing the sheriff to adopt safe and proper police practices.[205] In the absence of such explicit statutory requirements, the court declared its unwillingness to impose "these obligations on the sheriffs" judicially;[206] and it therefore affirmed the trial court's dismissal of the action against the sheriff.

Other decisions in the state's courts of appeal reflect a continuing inability to define the status of persons who occupy positions that are classified as "state offices" because they were created by state law. Without even citing *Foster I* or other decisions defining a state office as one created by state law,[207] the fourth circuit ruled, in

202. 377 So. 2d at 587.

203. LA. R.S. 33:1433 (1950). At the time of the sheriff's alleged negligence, the statute provided that a sheriff was personally liable for torts committed by his deputies only when the deputy "in the commission of the said act or tort, acts in compliance with a direct order of, and in the personal presence of, the said sheriff at the time the act or tort is committed." A 1978 statute, 1978 La. Acts, No. 318, deleted this provision. For an analysis of the effect of the 1978 amendment, *see Local Government Law—1977-78 Term*, *supra* note 13, at 877-78.

204. The court also purported to rely on *LeJeune v. Allstate Ins. Co.*, 365 So. 2d 471 (La. 1978). *LeJeune*, however, did not concern the vicarious liability of an official or governmental entity; it dealt with the plaintiff's ability to proceed against an insurance company that had issued a liability policy covering tortious acts by the deputy.

205. 377 So. 2d at 588. The court did not cite any of the constitutional and statutory provisions to which it referred.

206. *Id.* The court went so far as to express doubts as to whether it was "constitutionally empowered" to develop such limits. *Id.* In view of the vagueness of the relevant legislative provisions, such doubts appear frivolous. See notes 230-31, *infra*, and accompanying text.

207. *See, e.g.*, State v. Dark, 195 La. 139, 150, 196 So. 47, 50 (1940); State v. Titus, 152 La. 1011, 1015, 95 So. 106, 107 (1922); Cosenza v. Aetna Ins. Co., 341 So. 2d 1304, 1305 (La. App. 3d Cir. 1977). *Cf.* LA. R.S. 42:1 (1950) ("[A] *public office* means any state,

*Mullins v. State*,[208] that a coroner is a "parochial officer" and not "a state agency."[209] The basis for the court's ruling is not entirely clear. The opinion notes the constitutional provisions establishing the office of coroner as well as various statutory provisions applicable to coroners.[210] But the opinion appears to base its determination that the coroner is a parochial officer on the parish's responsibility for the "necessary and unavoidable expenses" of the office,[211] the coroner's duty to report to the parish governing authority on a regular basis,[212] and the constitution's authorization for the parish governing authority to fill vacancies in the office.[213]

Confusion also continues to shroud the status of other officials who serve within the borders of particular local governments. A good example of the confusion is the third circuit's recent decision in *Hryhorchuk v. Smith*,[214] which held that the constable of the fifth ward of Calcasieu Parish was not an employee of the parish police jury.[215] In reaching this decision, the *Hryhorchuk* opinion principally relied on the supreme court's 1977 decision in *Savoie v. Fireman's Fund Insurance Company*,[216] which sets "forth succinctly the criteria for the finding of an employee-employer realtionship."[217] An extensive quotation from *Savoie* declared that "the most important element to be considered [in deciding if an employment relationship ex-

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district, parish or municipal office, elective or appointive . . . when the office or position is established by the constitution or laws of this state.") (emphasis supplied). The statute creating the office of constable is R.S. 13:2581.2.

208. 378 So. 2d 503 (La. App. 4th Cir. 1979).

209. *Id.* at 506.

210. *Id.*, *citing* LA. CONST. art. V, §§ 29, 31 (creating office of coroner and protecting him from a diminution of his salary during his term of office); LA. R.S. 33:1551-68 (1950 & Supp. 1966) (prescribing the qualifications and duties of coroners); LA. R.S. 33:1558(B) (Supp. 1978) (setting maximum fees that the coroner may charge); LA. R.S. 33:6137 (Supp. 1954) (making coroners and their assistants eligible for the Parochial Employees Retirement System).

211. 378 So. 2d at 506, *citing* LA. R.S. 33:1558(B) (Supp. 1978).

212. 378 So. 2d at 506, *citing* LA. R.S. 33:1566 (Supp. 1952) (requiring semiannual reports to police juries by all coroners); LA. R.S. 33:1632 (Supp. 1956) (requiring annual report to parish governing authority by the Jefferson Parish coroner).

213. LA. CONST. art. V, § 30.

214. 379 So. 2d 281 (La. App. 3d Cir. 1979), *cert. granted*, 381 So. 2d 1225, 1226, 1231 (La. 1980).

215. The court also concluded the constable was not an employee or agent of the sheriff, the State Department of Public Safety, or the State Department of Transportation because all of these defendants had an even more attenuated relationship with the constable than did the police jury. *Id.* at 289. The court did not discuss whether the state (apart from a specific state department) might be liable under the rationale of *Foster I & II*.

216. 347 So. 2d 188 (La. 1977).

217. 379 So. 2d at 289.

ists] is the right of control and supervision over an individual," and suggested a number of factors bearing on the control issue: "the selection and engagement of the worker, the payment of wages, . . . the power of control and dismissal,"[218] and the existence of a "synallagmatic contract . . . by which one party gives to the other the enjoyment of . . . his labor, at a fixed price."[219] Judged by these standards, the court of appeal concluded that the parish police jury did not have an employment relationship with the constable. He had no synallagmatic contract with the parish, nor did the parish select or engage him for employment, supervise him, or have the power to dismiss him. Although the police jury did contribute to his wages,[220] this wage contribution was, the court declared, insufficient to make him a parish employee.

The third circuit's analysis of the employment issue emphasized that, as a legislatively created office, the office of constable fell within the established definition of a "state office" as "one created by the constitution or state statute."[221] It then cited *Foster I* and its own precedent in *Cosenza v. Aetna Insurance Company*[222] as absolving parishes of all liability for torts committed by state officers over whom they exercise "no power, authority or discretion."[223] The court distinguished the seemingly contrary precedent of *Honeycutt v. Town of Boyce*[224] on the ground that the relationship between the marshall and the town "was assumed rather than discussed" in *Honeycutt* because the earlier decision was based on pleadings that alleged that the marshal injured the plaintiff while the former "was performing duties incident to his employment with [the town]."[225]

The implications of *Foster II* extend beyond local government law, for the case states a general principle of obligations that applies to all employment relationships.[226] But from the vantage point

218. *Id. quoting* Savoie v. Fireman's Fund Ins. Co., 347 So. 2d 188, 191 (1977).

219. 379 So. 2d at 289, *quoting* LA. CIVIL CODE. art. 2669.

220. 379 So. 2d at 289. *See* LA. R.S. 13:2586.1 (Supp. 1975).

221. 379 So. 2d at 290. See note 207, *supra.*

222. 341 So. 2d 1304 (La. App. 3d Cir. 1977). For a critique of the *Cosenza* decision, *see Local Government Law—1976-77 Term, supra* note 191, at 477-80.

223. 379 So. 2d at 291.

224. 341 So. 2d 327 (La. 1976). For a critique of the *Honeycutt* decision, *see Local Government Law—1976-77 Term, supra* note 191, at 476-77, 479-80. *See also Local Government Law—1978-79 Term, supra* note 191, at 710-11.

225. 379 So. 2d at 291. This distinction is not persuasive. Although the supreme court's treatment of the issue is cursory, the opinion of the third circuit explicitly acknowledges that the marshal's office was legislatively created. *See* Honeycutt v. Town of Boyce, 327 So. 2d 154, 158 (La. App. 3d Cir.), *rev'd on other grounds*, 341 So. 2d 327 (La. 1976).

226. *See* p. 355 *supra.* Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemna*, 41 La. L. Rev. 659 (1981).

of local government law, the decision deserves praise in two respects. First, the court seems, in *Foster II*, to have served the cause of justice in the specific case before it. The omission of the state as a defendant in the original action was understandable because an unchallenged precedent of the fourth circuit declared that the state was not the employer of a deputy sheriff.[227] To have denied compensation to the *Foster* plaintiff simply because his attorney failed to anticipate a rather abrupt shift in doctrine seems unfair, especially in the absence of any claim that the delay in naming the state prejudiced its ability to defend on the merits. Second, *Foster II* promotes judicial efficiency by making it less necessary for future plaintiffs to name the state and all local governments in the area as defendants in every lawsuit resulting from the acts of a public servant. If a contrary rule had been adopted, the only effective way any attorney could have protected his client's interest in the face of the uncertainty that characterizes current Louisiana doctrine would have been to name the state in every action, no matter how small the likelihood of actual recovery might appear. Many attorneys will doubtless still follow that practice, but *Foster II* at least ensures that the attorney who chooses his potential defendants with more circumspection will not be penalized for some unanticipated change in doctrine.

The various decisions of the courts of appeal reflect the failure of the supreme court to articulate coherent principles for imposing tort liability on local governments and officials. *Nolen's* extension of the immunity for sheriffs is particularly unfortunate; surely, reasonable implications of the statute authorizing the sheriff to appoint deputies[228] are requirements that the sheriff hire only persons who meet certain minimal standards and that he offer some minimal level of training and supervision to those who are hired, and an equally reasonable implication of the constitution's provision making the sheriff the chief law enforcement officer in the parish he serves[229] is a requirement that he adopt procedures that fall within the range of acceptable police practices. Fortunately, the practical significance of *Nolen* is limited because *Foster I & II* give the plain-

227. Wambles v. State, 283 So. 2d 331 (La. App. 4th Cir. 1973). After a last-ditch attempt by the first circuit to dismiss *Foster I*, Michaelman v. Amiss, 376 So. 2d 1029 (La. App. 1st Cir. 1979), *rev'd and remanded*, 382 So. 2d 166 (La. 1980) (per curiam), *Wambles* seems to have been overruled on its specific facts in a decision rendered at the beginning of the 1980-81 term. Michaelman v. Amiss, 385 So. 2d 404 (La. App. 1st Cir.), *cert. denied*, 385 So. 2d 800 (La. 1980).

228. LA. R.S. 33:1433 (Supp. 1968 & 1978).

229. LA. CONST. art. V, § 27. For a discussion of the significance of this provision, *see* Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 841-43 (1977).

tiff a cause of action against the state, normally a preferable defendant to an individual sheriff. Indeed, the practical limit to the significance of *Nolen* may well explain why the plaintiffs did not seek supreme court review of the decision.

Considered together, the *Mullins* and *Hryhorchuk* decisions reveal the inadequacy of the "state officer" label to define the varied relationships among the state, local governments, and officials who serve within local government boundaries. Carried to its logical extreme, the "state officer" rationale would impose liability on the state rather than the local government for all officials in all local governments except those with home rule charters, since all such offices originate in a state statute. Past decisions strongly suggest that even the third circuit is unlikely to reach that logical absurdity,[230] but the task now before the supreme court is to develop tests for identifying those officers serving within a local government's geographic boundaries for which the local government will be required to assume responsibility.[231] The court has granted certiorari in *Hryhorchuk*, and one can hope, therefore, that the court will use it as the vehicle for articulating some clear principles to guide future decisions.

*Corporal Punishment in Public Schools*

"[S]ubject to any rules as may be adopted by the parish or city school board," R.S. 17:416.1(A)[232] authorizes public school employees to "employ . . . reasonable disciplinary and corrective measures to maintain order in the school," and recent decisions by the state's courts of appeal have uniformly concluded that this provision permits corporal punishment so long as it is reasonable under the circumstances.[233] Some of the opinions have emphasized that deter-

230. *See, e.g.*, Jones v. City of Lake Charles, 295 So. 2d 914 (La. App. 3d Cir. 1974).

231. The ultimate impact of *Foster I* may be to cast the state into a role as residual employer of all public servants for whose torts no local government is forced to assume responsibility. *See Local Government Law—1976-77 Term*, *supra* note 191, at 480 n.103.

232. LA. R.S. 17:416.1(A) (Supp. 1975).

233. LeBoyd v. Jenkins, 381 So. 2d 1290, 1291 (La. App. 4th Cir. 1980); LeBlanc v. Tyler, 381 So. 2d 908, 908 (La. App. 3d Cir. 1980); McKinney v. Greene, 379 So. 2d 69, 71 (La. App. 3d Cir.), *cert. denied*, 381 So. 2d 1233, 1235 (La. 1980); White v. Richardson, 378 So. 2d 162, 162-63 (La. App. 1st Cir. 1979); Thompson v. Iberville Parish School Bd., 372 So. 2d 642, 644 (La. App. 1st Cir.), *cert. denied* 374 So. 2d 650 (La. 1979). *See generally* Comment, *Corporal Punishment of Students—The State's Authority and Constitutional Considerations*, 36 LA. L. REV. 984, 986-90 (1976). The United States Supreme Court has ruled that the imposition of corporal punishment does not violate the student's constitutional rights even if the student receives no prior hearing concerning the underlying conduct. Ingraham v. Wright, 430 U.S. 651 (1977).

mining whether a particular instance of corporal punishment is reasonable requires a consideration of numerous factors such as "the age and physical condition of the pupil, the seriousness of the misconduct eliciting the punishment, the nature and severity of the punishment, the teacher's motive in the discipline, the attitude and past behavior of the child and the availability of less severe but equally effective means of discipline."[234] Nonetheless, nearly all of the recent cases have tended to conclude rather summarily that the corporal punishment was reasonable without detailed consideration of individual factors. During the 1979-80 term, decisions of Louisiana's courts of appeal denied liability where a teacher "extended his leg and pushed" a twelve-year-old student;[235] where one sixth-grade student gave another ten licks with a wooden paddle;[236] where as the result of a spanking that a teacher administered to a fourteen-year-old student, the student received bruises that "color photographs taken at [a subsequent doctor's examination] seem[ed] to indicate . . . were more than mild;"[237] and where the teacher hit a ten-year-old student on the hand with a leather strap, perhaps causing a bruised wrist and broken thumb.[238]

In two of the cases referenced above, the appellate courts actually reversed findings of the trial courts that the punishments were excessive under the circumstances.[239] A trial court's decision imposing liability was upheld in only one case, and even in that decision the court reduced a $500 damage award to $100. In *McKinney v. Greene*,[240] a divided panel of the third circuit held that a principal

234. Thompson v. Iberville Parish School Bd., 372 So. 2d 642, 644 (La. App. 1st Cir.), *cert. denied*, 374 So. 2d 650 (La. 1979). *Accord*, LeBoyd v. Jenkins, 381 So. 2d 1290, 1292 (La. App. 4th Cir. 1980).

235. Thompson v. Iberville Parish School Bd., 372 So. 2d 642, 643 (La. App. 1st Cir.), *cert. denied*, 374 So. 2d 650 (La. 1979) (defendant's version of the incident).

236. White v. Richardson, 378 So. 2d 162 (La. App. 1st Cir. 1979).

237. LeBlanc v. Tyler, 381 So. 2d 908, 909 (La. App. 3d Cir. 1980). Judge Domengeaux filed a brief concurring opinion in which he disavowed the majority statement that color photographs seemed to indicate the bruises in *LeBlanc* were more than mild. In fact, he declared, the *LeBlanc* bruises were similar to those involved in a 1975 decision of the third circuit refusing to impose liability. 381 So. 2d at 910, (Domengeaux, J., concurring), *citing* Roy v. Continental Ins. Co., 313 So. 2d 349 (La. App. 3d Cir. 1975).

238. LeBoyd v. Jenkins, 381 So. 2d 1290 (La. App. 4th Cir. 1980). Considerable evidence suggested that the plaintiff's injuries were no more than minimal, but the court held that the punishment was reasonable even if the plaintiff's version of the incident, which is paraphrased in text, were accepted. *Id.* at 1292.

239. LeBlanc v. Tyler, 381 So. 2d 908 (La. App. 3d Cir. 1980); Thompson v. Iberville Parish School Bd., 372 So. 2d 642 (La. App. 1st Cir. 1979). In *Thompson*, the court refused the judgment against the teacher but affirmed the judgment against the school board, which had not appealed.

240. 379 So. 2d 69 (La. App. 3d Cir. 1979), *cert. denied*, 381 So. 2d 1233, 1235 (La. 1980). Judge Stoker dissented. He gave three reasons for his conclusion that the prin-

who broke up a fight between two students by kicking "with the side of his shoe" a thirteen-year-old student in the school's special education program[241] had violated a school board resolution limiting corporal punishment to "striking the student on the buttocks with a paddle a maximum of five (5) times" but permitting school employees to use "physical force, reasonable and appropriate under the circumstances, to restrain a student from attacking another student."[242] According to the court of appeal, the local resolution "clearly prohibited [the principal] from kicking students as a means of administering corporal punishment in normal disciplinary situations."[243] Moreover, the principal's conduct was not permissible even "[a]ssuming for the sake of argument" that the exception allowing the use of physical force to restrain one student from attacking another was applicable.[244] The principal "has sufficient time to put down the items in his hands, which would have allowed him to use a less offensive but equally effective method of restraining the child," and

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cipal "was not guilty of an actionable tort": (1) the evidence did not "justify characterizing the action of the . . . principal as 'kicking' [the plaintiff]"; (2) the legislature did not intend language of R.S. 17:416.1(A) "to accord to local school boards the privilege of setting up standards of civil liability for intentional torts through administrative directions or prohibitions"; and (3) the principal's actions were "reasonable under the circumstances" and thus authorized under the local school board's resolution. 379 So. 2d at 74 (Stoker, J., dissenting).

After extensively quoting from the trial transcript, Judge Stoker concluded that, although "in the general sense of the word [the principal] did kick" the plaintiff, that action should not be characterized as a kick for tort purposes because of the lack of significant force, the failure to use the point of the toe, and the lack of any physical harm to the plaintiff. Instead, the action should be interpreted, not "as punishment" but as an attempt to get the plaintiff's attention like a touch on the shoulder or a grip on the arm. *Id.* at 76.

Seeing "no reason to believe that the legislature meant to authorize differing standards of civil liability for intentional torts growing out of unreasonable or excessive punishment administered to students by school authorities," he argued that the "subject to" language of R.S. 17:416.1(A) should be interpreted to confine local control to the ability to "take administrative action against the school official." *Id.* This would prevent the twin dangers of allowing local boards to authorize "types of punishment so harsh, that they would be unacceptable under reasonable state standards" or permitting them to establish overly restrictive standards that would render the state statute nugatory. *Id.* at 76-77.

Finally, the dissent opined that the principal had not committed a tort even if the local resolution established the standard for civil liability. That regulation only concerned the administration of "corporal *punishment*," while the principal's action in *McKinney* was merely "restraining and preventative action." *Id.* at 77 (emphasis in original).

241. 379 So. 2d at 71.

242. *Id.* at 72, *quoting* Sabine Parish School Bd. Resolution, December 15, 1976.

243. 379 So. 2d at 72.

244. *Id.*

his actions were not, therefore, "reasonable and appropriate under the circumstances."[245]

A natural response to an initial reading of the corporal punishment cases is to praise the courts for supporting school authorities in these days of unrestrained criticism of public education. But more careful reflection suggests that the courts not only have sustained some punishments that seem unfair to the particular children involved, but that they also have neglected an opportunity to make more concrete the vague "reasonableness" standard established by the statute. At least two such concretizing possibilities seem obvious. On the one hand, the courts could have analyzed the cases before them in detail with respect to the individual factors quoted above. The cynic in one suggests that a reason they failed to do so was the clarity with which such analyses would have revealed the unreasonableness of the particular punishments being challenged, for nearly all of the decisions involved corporal punishment being administered by grown men in a pique of anger to relatively young children for minor instances of misconduct.[246] A second method of making the vague standard of reasonableness more definite would have been to focus on the methods by which the punishment was administered, for the recent cases reveal all of the following questionable procedures: administering corporal punishment by a fellow student,[247] administering the punishment in a public setting that maximizes the student's humiliation,[248] kicking a student,[249] and striking a student on a part of his body other than the buttocks.[250]

None of the recent decisions seems to have involved serious injuries,[251] and the lack of special damages may explain the judicial

245. *Id.*

246. The one exception is *LeBlanc v. Tyler*, 381 So. 2d 908 (La. App. 3d Cir. 1980), which involved a spanking to a fourteen-year-old student by a female teacher; one is somewhat surprised, therefore, to discover that the *LeBlanc* injuries were perhaps the most serious of the five cases.

247. White v. Richardson, 378 So. 2d 162 (La. App. 1st Cir. 1979).

248. All five decisions discussed in the text share this attribute.

249. McKinney v. Greene, 379 So. 2d 69 (La. App. 3d Cir.), *cert. denied*, 381 So. 2d 1233, 1235 (La. 1980); Thompson v. Iberville Parish School Bd., 372 So. 2d 642 (La. App. 1st Cir.), *cert. denied*, 374 So. 2d 650 (La. 1979).

250. LeBoyd v. Jenkins, 381 So. 2d 1290 (La. App. 4th Cir. 1980).

251. *See id.* at 1292 ("The type of paddling administered was less severe, and not nearly so embarassing, as would have been a spanking on the backside, and none of the other students were injured by it."); LeBlanc v. Tyler, 381 So. 2d 908, 909 (La. App. 3d Cir. 1980) (plaintiff's doctor testified that "as a rule in this type of situation the injury is confined to the superficial areas of the skin"); White v. Richardson, 378 So. 2d 162, 163 (La. App. 1st Cir. 1979) ("We note additionally that no evidence was presented by the parents of the boy as to their observations concerning a description or the extent of his injuries and, by his own testimony, no home treatment was used

reluctance to impose liability even for unreasonable acts by school employees. To the extent that this explanation reflects the true rationale of the cases, *McKinney's* approach of imposing liability but awarding nominal damages would appear to be the far more rational response.

Representatives of school boards and teachers are likely to praise the recent decisions because almost all refused to impose liability in the specific case before the court. But the failure to develop definite standards may have adverse consequences for the school systems themselves, because the vague criterion of reasonableness leaves one at the whim of the specific judge (or panel on appeal) to which a particular case might be assigned in the future.[252] Both to protect school employees and to offer redress to the occasional student who is abused, a school board would be well-advised, notwithstanding the recent decisions, to adopt local rules incorporating procedures such as requirements for prior consultation with parents before imposition of corporal punishment, the use of a specified instrument for administering punishments, and administration of the punishment by a teacher or administrator in a private setting witnessed by another adult member of the school staff.

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except the taking of baths from the time of paddling until he saw Dr. Walker"); Thompson v. Iberville Parish School Bd., 372 So. 2d 642, 645 (La. App. 1st Cir.), *cert. denied*, 374 So. 2d 650 (La. 1979) ("The lack of objective symptoms of injury convinces us that the contact with Bryan was not excessively severe"). An additional explanation in *LeBoyd* may have been an understandable judicial reluctance to impose liability for an injury that allegedly occurred sixteen years earlier. 381 So. 2d at 1291.

252. *Compare* McKinney v. Greene, 379 So. 2d 69 (La. App. 3d Cir. 1979), *cert. denied*, 381 So. 2d 1233, 1235 (La. 1980), *with* Thompson v. Iberville Parish School Bd., 372 So. 2d 642 (La. App. 1st Cir.), *cert. denied*, 374 So. 2d 650 (La. 1979). Although the *McKinney* opinion attempts to distinguish *Thompson* on the ground that *McKinney* involved a rule of the local school board, 379 So. 2d at 72 n.1, the two cases are really inconsistent. *McKinney* held its kicking was not "reasonable and appropriate under the circumstances," *id.* at 72; on the contrary, *Thompson* held in kicking the student, its teacher-defendant "acted reasonably under the particular circumstances of this case." 372 So. 2d at 645. Several older Louisiana cases illustrate the ability of a court to find particular conduct unlawful and unacceptable under a standard of reasonableness. *See* Houeye v. St. Helena Parish School Bd., 223 La. 966, 67 So. 2d 553 (1953); Johnson v. Horace Mann Mut. Ins. Co., 241 So. 2d 588 (La. App. 2d Cir. 1970); Frank v. Orleans Parish School Bd., 195 So. 2d 451 (La. App. 4th Cir.), *cert. denied*, 250 La. 635, 197 So. 2d 653 (1967).